Supreme Court, U.S.
FILED
99 160 JUL 23 1999
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

AMERICAN STORES COMPANY AND SUBSIDIARIES,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

PAUL J. SAX
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
Old Federal Reserve Bank Building
400 Sansome Street
San Francisco, CA 94111-3143
Telephone: (415) 392-1122

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19-PP

QUESTION PRESENTED

Whether the Internal Revenue Service may by Treasury Regulation invite reliance upon its Revenue Rulings, issue a Revenue Ruling of general application, then decline to apply the Revenue Ruling to particular taxpayers on an ad hoc basis.

PARTIES BELOW

The parties below consisted of petitioner-appellant American Stores Company and Subsidiaries and respondent-appellee Commissioner of Internal Revenue.

DISCLOSURE PURSUANT TO RULE 29.6

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, the petitioner-appellant American Stores Company states that the following is its only parent corporation, and it has no non-wholly owned subsidiaries:

Albertson's, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES BELOW ii

DISCLOSURE PURSUANT TO RULE 29.6 ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE PETITION 9

I. The Decisions Below and in the Companion Cases Create a Conflict Among the Circuits as to Whether the IRS Must Follow Its Own Revenue Rulings Until They Are Modified or Revoked 10

II. The Absence of Decisions By This Court has Created a Vacuum that Has Led to Arbitrary IRS Enforcement 11

III. Cases Decided by This Court in the Prior Era No Longer Have Relevance 14

IV. The Doctrine of *Manhattan General* Has No Application Here Because it Governs Rulings that Erroneously Interpret a Clear Statute; This is a Case of the Revenue Ruling Implementing an Ambiguous Statute 16

V. Failure to Apply Revenue Rulings Violates Treasury Regulations, Elementary Fairness and Due Process of Law 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Airborne Freight Corp. v. United States, 153 F.3d 967 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 1755 (1999) 10

Airborne Freight Corp. v. United States, No. C95-301R, 1995 U.S. Dist. LEXIS 19822 (W.D. Wash. Nov. 7, 1995) 18

American Stores Company and Subsidiaries v. Commissioner of Internal revenue, 170 F.3d 1267 (10th Cir. 1999) 8, 10

American Stores Company and Subsidiaries v. Commissioner of Internal Revenue, 108 T.C. No. 12 (1997) 1, 18

Automobile Club of Michigan v. Commr, 353 U.S. 180 (1957) 14, 15

Beneficial Foundation, Inc. v. United States, 8 Cl. Ct. 639 (1985) 10

Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984), *rehearing denied*, 468 U.S. 1227 (1984) 12

Commissioner of Internal Revenue v. Schleier, 515 U.S. 323 (1995) 11

Davis v. United States, 495 U.S. 472 (1990) 12

Dickman v. Comm'r, 465 U.S. 330 (1984)..... 14

Dillon, Read & Co., Inc. v. United States, 875 F.2d 293 (Fed. Cir. 1989)..... 10

Dixon v. U.S., 381 U.S. 68 (1965) 14, 15

Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 (1984) 13

TABLE OF AUTHORITIES – Continued

Page

International Business Machines Corp. v. United States, 343 F.2d 914 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 1028 (1966) 13

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 20

Local 144 Nursing Home Pension Fund v. Demisay, 508 U.S. 581 (1993) 17

Lucky Stores, Inc. and Subsidiaries, Inc. v. U.S., 153 F.3d 964 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 1755 (1999) 10, 18

Lucky Stores, Inc. and Subsidiaries v. Commissioner of Internal Revenue, 107 T.C. 1 (1996) 18

Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129 (1936) 16

Estate of McLendon v. Commissioner of Internal Revenue, 135 F.3d 1017 (5th Cir. 1998) 9, 10, 12

Estate of Shapiro v. Commissioner of Internal Revenue, 111 F.3d 1010 (2d Cir. 1997), *cert. denied*, 118 S.Ct. 686 (1998) 19

Silco, Inc. v. United States, 779 F.2d 282 (5th Cir. 1986) 10

Stichting Pensioenfonds Voor de Gezondheid, Geestelijke en Maatschappelijke Belangen v. United States, 129 F.3d 195 (D.C. Cir. 1997), *cert. denied*, 119 S.Ct. 43 (1998) 12

Travelers Ins. Co. v. United States, 35 Fed. Cl. 138 (1996) 10

TABLE OF AUTHORITIES – Continued

Page

United States Immigration and Naturalization Service v. Hibi, 414 U.S. 5 (1973), *rehearing denied*, 414 U.S. 1104 (1973) 13

United States v. Kaiser, 363 U.S. 299 (1960) 19

FEDERAL STATUTES

26 U.S.C.

§ 404(a)(6) 2, 16

§ 6213 6

§ 7442 6

§ 7805 ..... 2, 13

§ 7805(a) 13

§ 7805(b) 3, 13, 20

28 U.S.C.

§ 1254(1) 1

PRIVATE LETTER RULINGS

PLR 7945115 7

PLR 8042133 7

PLR 8111082 7

PLR 8207051 6

PLR 8526068 7

PLR 8227068 6

TAM 8210014 6

TABLE OF AUTHORITIES – Continued

Page

TAM 8303002 7

TAM 8543002 6

TAM 8714008 6

TREASURY REGULATIONS

Treas. Reg. § 601.601(d) 2, 3, 4, 15, 16, 20

TREASURY PRONOUNCEMENTS

Revenue Ruling 76-28 ..... 5, 6, 7, 15

Revenue Ruling 76-28, 1976-1 C.B. 106 ..... 5, 17

Revenue Ruling 80-80 11

Revenue Ruling 1976-1 C.B. 107 12

1922 C.B. i 5, 14, 15

1934-1 C.B. i 15

1938-1 C.B. i 15

1943 C.B. i 15

1944 C.B. i 14, 15

1952-1 C.B. i 14

1953-1 C.B. i 15

MISCELLANEOUS

Mortimer M. Caplin, *Taxpayer Rulings Policy Of The Internal Revenue Service: A Statement Of Principles*, 20 N.Y.U. INST. FED. TAXN 1, 6 (1962) 15

TABLE OF AUTHORITIES – Continued

Page

Benjamin J. Cohen & Catherine A. Harrington, *Is the Internal Revenue Service Bound by Its Own Regulations and Rulings?*, 51 TAX LAW. 675 (1998) 12, 15

Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OH. ST. L.J. 1037, 1042 (1995) 13

PETITION FOR A WRIT OF CERTIORARI

American Stores Company and Subsidiaries respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 170 F.3d 1267 (10th Cir. 1999), and is included herein at Appendix ("App.") 1-33. The order of the Court of Appeals denying petitioner-appellant's petition for panel rehearing is unreported, but is included herein at App. 81. The opinion of the Tax Court below is reported at 108 T.C. 178 (1997), and included herein at App. 35-78. The opinion of the Tax Court below denying petitioner-appellant's requests for judicial notice and motion for reconsideration are unreported, but are included herein at App. 79.

JURISDICTION

The Court of Appeals filed its opinion on March 9, 1999. Petitioner-appellant timely filed a petition for panel rehearing on April 20, 1999, which was denied on April 26, 1999. (App. 81.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. The Fifth Amendment to the United States Constitution, which provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

2. 26 U.S.C. § 404(a)(6) (1986), which provides, in pertinent part:

> [A] taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).

3. 26 U.S.C. § 7805 (1986), which provides, in pertinent part:

> (a) AUTHORIZATION. – Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.
>
> (b) RETROACTIVITY OF REGULATIONS OR RULINGS. – The Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect.

4. Treas. Reg. § 601.601(d)(2)(iii), (as amended in 1983) which provides, in pertinent part:

> The purpose of publishing revenue rulings and revenue procedures in the Internal Revenue Bulletin is to promote correct and uniform application of the tax laws by Internal Revenue Service employees and to assist taxpayers in attaining maximum voluntary compliance by informing Service personnel and the public of National Office interpretations of the internal revenue laws, related statutes, treaties, regulations, and statements of Service procedures affecting the rights and duties of taxpayers.

5. Treas. Reg. § 601.601(d)(2)(v)(*a*), (as amended in 1983) which provides, in pertinent part:

> Rulings and other communications involving substantive tax law published in the Bulletin are published in the form of Revenue Rulings. The conclusions expressed in Revenue Rulings will be directly responsive to and limited in scope by the pivotal facts stated in the revenue ruling. Revenue Rulings arise from various sources, including rulings to taxpayers, technical advice to district offices, studies undertaken by the Office of the Assistant Commissioner (Technical), court decision, suggestions from tax practitioner groups, publications, etc.

6. Treas. Reg. § 601.601(d)(2)(v)(*c*), (as amended in 1983) which provides, in pertinent part:

> Where Revenue Rulings revoke or modify rulings previously published in the Bulletin the authority of section 7805(b) of the Code ordinarily is invoked to provide that the new rulings will not be applied retroactively to the extent that the new rulings have adverse tax consequences to taxpayers. Section 7805(b) of the Code provides that the Secretary of the Treasury

> or his delegate may prescribe the extent to which any ruling is to be applied without retroactive effect. The exercise of this authority requires an affirmative action.

7. Treas. Reg. § 601.601(d)(2)(v)(*d*), (as amended in 1983), which provides, in pertinent part:

> Revenue Rulings published in the Bulletin do not have the force and effect of Treasury Department Regulations (including Treasury decisions), but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose.

8. Treas. Reg. § 601.601(d)(2)(v)(*e*), (as amended in 1983), which provides:

> Taxpayers generally may rely upon Revenue Rulings published in the Bulletin in determining the tax treatment of their own transactions and need not request specific rulings applying the principles of a published Revenue Ruling to the facts of their particular cases. However, since each Revenue Ruling represents the conclusion of the Service as to the application of the law to the entire state of facts involved, taxpayers, Service personnel, and others concerned are cautioned against reaching the same conclusion in other cases unless the facts and circumstances are substantially the same. They should consider the effect of subsequent legislation, regulations, court decisions, and revenue rulings.

———◆———

STATEMENT OF THE CASE

Revenue Rulings are the second most important form of guidance issued by the Internal Revenue Service ("IRS"), after Treasury Regulations. Since 1973 they have been issued pursuant to a Treasury Regulation formally inviting taxpayers to rely upon Revenue Rulings.

In prior years, taxpayers were not invited to rely upon Revenue Rulings. Commencing in 1922 they were issued under an express disclaimer and admonition not to rely. The prior decisions of this Court on the force and effect of Revenue Rulings dealt with that prior era. This Court has not ruled on the force and effect of Revenue Rulings in the modern era, after taxpayers were invited to rely on Revenue Rulings by Treasury Regulation.

The statutory provision at issue in this case, section 404(a)(6) of the Internal Revenue Code, allows taxpayers to deduct contributions to retirement plans made after year-end but before the return filing date, if the contribution is "on account of" the prior year. This provision affords great flexibility in tax planning, which is widely utilized by employers.

The application of the statutory language to defined benefit pension plans is not clear. However, in Revenue Ruling 76-28, 1976-1 C.B. 106 (App. 82), the IRS defined "on account of" so as to make the deduction of contributions elective in the case of contributions to defined benefit pension plans.

In a series of private letter rulings interpreting and applying Revenue Ruling 76-28 over a period of nearly twenty years, the IRS confirmed this interpretation,

explaining and elaborating on how Revenue Ruling 76-28 made deductions elective in the case of contributions to defined benefit pension plans. All defined benefit pension plans were treated alike. No distinction was drawn between single employer plans and multiemployer plans. Several of the private letter rulings involved multiemployer defined benefit pension plans.

In claiming deductions in its return for its 1988 tax year, Petitioner-Appellant ("Petitioner") deducted contributions made to multiemployer defined benefit pension plans, in accordance with Revenue Ruling 76-28 and the IRS confirmation in its private letter rulings.

On audit, without revocation or modification of Revenue Ruling 76-28, the IRS disallowed Petitioner's deductions. Petitioner sought relief and petitioned for a redetermination of the deficiency asserted by the IRS. The jurisdiction of the U.S. Tax Court was invoked pursuant to 26 U.S.C. § 6213 and 26 U.S.C. § 7442.

In the Tax Court Petitioner invoked Revenue Ruling 76-28. Petitioner submitted in support the IRS interpretations in ten private letter rulings. Included were three involving multiemployer plans, including some of the very plans to which Petitioner made the contributions disallowed as deductions in this case. Two of the three private letter rulings involving multiemployer plans were stipulated joint exhibits. *See* TAM 8210014, Joint Exhibit ("Jt. Exh.") 57-BE; TAM 8714008, Jt. Exh. 61-BI. (App. 108.) Doc. 14 at 55. The third was cited in Appellee's Tax Court brief. TAM 8303002. (App. 112.) Doc. 19 at 135. Four others were stipulated joint exhibits. PLR 8207051, Jt. Exh. 62-BJ; PLR 8227068, Jt. Exh. 59-BG; PLR 8526068,

Jt. Exh. 60-BH; TAM 8543002, Jt. Exh. 58-BF. (App. 138.) Doc. 14 at 55. The remaining three were cited in Respondent's Tax Court Brief below. PLR 7945115, PLR 8042133, PLR 8111082. (App. 143-158.) Doc. 19 at 135. One of them was also cited in Petitioner's Tax Court Brief and Reply Brief. PLR 8042133. Doc. 20 at 47; (App. 147.) Doc. 22 at 27, 35, 36.

The IRS argued to the Tax Court that under Revenue Ruling 76-28 the distinction between single employer plans and multiemployer plans was "pivotal" and "critical". The IRS argued not only that contributions to multiemployer plans should be treated differently, but that they had been treated differently by the IRS. In support, the IRS represented to the Tax Court on brief that its prior private letter rulings applying Revenue Ruling 76-28 had not involved multiemployer plans. *See* Appellee's Reply Brief (Doc. 21) at 17, 22, 31-33, 55 and 74. That representation was false. The Department of Justice ultimately acknowledged this by letter to the Court of Appeals dated March 20, 1998, after the Tax Court proceedings were closed, and after briefing was completed in the Court of Appeals, explaining to the Court that:

> Nevertheless, based on taxpayers' submissions (the bulk of which had also been presented to the Tax Court), it would appear that statements to the contrary made by counsel for the Commissioner on brief to the Tax Court in the present case were incorrect.[1]

---

[1] Much of the litigation before the Tax Court and the Court of Appeals below involved placing before the courts, in requests for judicial notice, various IRS and other documents. *See*

(*See* App. 159). The courts below nonetheless sustained the IRS disavowal of its Revenue Ruling and refusal to apply it to the taxpayer in this case.

Excerpts of Request for Judicial Notice (App. 85-104.) Included were some of the private letter rulings in the unexpurgated versions in which they were issued to the affected taxpayers. It is the use of these documents for the limited purpose to disprove the IRS's false representations that appears to have caused confusion in the Court of Appeals with respect to what may be judicially noticed. These versions of the private letter rulings became unnecessary when the IRS conceded that it had made false representations. To the extent the Court of Appeals held that the expurgated versions of such rulings put before the Tax Court, the form in which they were released and made publicly available by the IRS, could not properly be the subject of judicial notice, that conclusion is incorrect. *See American Stores and Subsidiaries v. Commission of Internal Revenue*, 170 F.3d 1267, 1270 (1999).

Private letter rulings cited to the court in the expurgated, published, disseminated versions are widely available so as to be judicially noticed. They are published in hard copy by the major tax law services. *See* IRS Letter Rulings Reporter (CCH); IRS Technical Advice Memorandums and IRS Letter Rulings (Tax Analysts); United States Tax Reporter, IRS Rulings (RIA). They are also widely distributed and available on line through both major computer research libraries. *See* LEXIS, Fedtax Library, Rels File; Westlaw, FTX-RELS Database. In addition, they are widely distributed and available on CD-ROM publications from a variety of sources, as well as on the Internet through subscription services. For CD-ROM publications, *see* Federal Taxation Library (West Publishing); Standard Federal

REASONS FOR GRANTING THE PETITION

Fundamental fairness is lost if the IRS is allowed by Treasury Regulation to invite reliance upon its Revenue Rulings, then to decline to apply them to particular taxpayers on an ad hoc basis. The Treasury Regulations provide a process for changing Revenue Rulings, by revocation or modification, including a provision that ordinarily Revenue Rulings will not be revoked or modified with retroactive effect. The IRS tactic of "reinterpreting" its Revenue Rulings in litigation when it does not like a result as to a particular taxpayer is offensive to procedural due process. It has been dealt with harshly by the Court of Appeals for the Fifth Circuit, which reversed and rebuked the Tax Court for allowing such unfairness. *Estate of McLendon v. Commissioner of Internal Revenue*, 135 F.3d 1017, 1025 (5th Cir. 1998). In the case below and its companions in the Ninth Circuit, those Courts of Appeals are in direct conflict, allowing the ad hoc IRS reinterpretation of Revenue Rulings.

If the IRS is to be allowed the device of "reinterpretation" to subvert elementary requirements of fairness and due process, consistency among identically situated taxpayers will be lost, confidence if the fairness of tax

---

Tax Reporter on CD-ROM (CCH); IRS Positions and Letter Rulings on CD-ROM (CCH); CCH Federal Source Docs (CCH); Kleinrock's Tax Library (Kleinrock Publishing Co.); On Point System (RIA); One Disc Professional Research Library, Chief Counsel Advice Disc (Tax Analysts). For internet subscription services, *see* Westlaw.Com <http://www.westlaw.com>; Lexis Nexis Xchange <http://www.lexis.com/xchange>; CCH Internet Tax Research <http://tax.cch.com/full/rom101.htm>; RIA Checkpoint <http://checkpoint.riag.com>.

administration will suffer, and the integrity of the tax system will be called into question.

I. The Decisions Below and in the Companion Cases Create a Conflict Among the Circuits as to Whether the IRS Must Follow Its Own Revenue Rulings Until They Are Modified or Revoked.

Whether the IRS may decline to apply its own Revenue Rulings to a particular taxpayer is now a matter of direct conflict between the circuits. The Fifth Circuit has decided that the IRS must follow its Revenue Rulings, in *Estate of McLendon,* 135 F.3d 1017. By contrast, the Tenth and Ninth Circuits have allowed the IRS to disavow its Revenue Rulings as to a particular taxpayer, in this case and the companion cases consolidated for oral argument in the Ninth Circuit. *See American Stores Company and Subsidiaries v. Commissioner of Internal Revenue,* 170 F.3d 1267 (10th Cir. 1999), *Lucky Stores, Inc. and Subsidiaries, Inc. v. U.S.,* 153 F.3d 964 (9th Cir. 1998), *cert. denied,* 119 S.Ct. 1755 (1999); *Airborne Freight Corp. v. United States,* 153 F.3d 967 (9th Cir. 1998), *cert. denied,* 119 S.Ct. 1755 (1999). The prior decisions require the IRS to follow its Revenue Rulings. *Dillon, Read & Co. v. United States,* 875 F.2d 293, 297-300 (Fed. Cir. 1989); *Silco, Inc. v. United States,* 779 F.2d 282, 287 (5th Cir. 1986); *Beneficial Foundation, Inc. v. United States,* 8 Cl. Ct. 639 (1985); *Travelers Ins. Co. v. United States,* 35 Fed. Cl. 138 (1996).

Estate of McLendon was not fully argued to the Court of Appeals below and in the companion cases in the Ninth Circuit, because it was decided after briefing was completed. In *Estate of McLendon,* decedent's estate

claimed the right to use the IRS actuarial tables to value the sale of a remainder interest. A Revenue Ruling allowed use of the tables unless the possibility of survival for a year was so remote as to be negligible. The decedent had a ten percent chance to survive one year, thus met the test. The IRS sought to "reinterpret" its Revenue Ruling by reference to prior case law that had disregarded the actuarial tables where "significant evidence" of life expectancy overcame their presumptive correctness. Expressing exasperation at the Tax Court view that Revenue Rulings are no more than evidentiary, the Fifth Circuit held that "Because McLendon was entitled to rely on Rev. Rul. 80-80, the Tax Court was not at liberty to disregard it." 135 F.2d at 1025. The IRS was bound by its Revenue Ruling, until revoked or modified.

II. The Absence of Decisions by This Court Has Created a Vacuum that Has Led to Arbitrary IRS Enforcement.

This Court has not directly addressed whether the IRS must follow its own Revenue Rulings issued to interpret an ambiguous statute. Nor has this Court considered the question in the modern era, in which Revenue Rulings since 1973 have been issued under a Treasury Regulation that expressly invites taxpayers to rely on Revenue Rulings until they are revoked or modified, and provides that ordinarily they will not be revoked or modified with retroactive effect. In recent years this Court has only reiterated general propositions, that "the Service's interpretive rulings do not have the force and effect of regulations" and "may not be used to overturn the plain language of a statute". *Commissioner of Internal Revenue v.*

Schleier, 515 U.S. 323, 336 n.8 (1995) (citations omitted). The absence of decisions by this Court created the vacuum in which the IRS appears in these cases.

When speaking to the force and effect of Revenue Rulings, an important recent article stated the premise that "[n]o decision of the Supreme Court has addressed the issue directly." *See* Benjamin J. Cohen & Catherine A. Harrington, *Is the Internal Revenue Service Bound by Its Own Regulations and Rulings?*, 51 TAX LAW. 675, 686 (1998).

Revenue Rulings have been described as the second most important interpretative pronouncement of the IRS. *Stichting Pensioenfonds Voor de Gezondheid, Geestelijke en Maatschappelijke Belangen v. United States*, 129 F.3d 195, 198 (D.C. Cir. 1997), *cert. denied*, 119 S.Ct. 43 (1998). Revenue Ruling 76-28 in this case was issued to provide rules where "guidelines are necessary pending the issuance of regulations." 1976-1 C.B. at 107. It is expressly a surrogate for regulations, intended to be respected as such, intended to be relied upon by taxpayers in ordering their tax and financial affairs.

By reason of the vacuum left by the absence of decisions by this Court directly addressing the question, the Tax Court "has long been fighting a losing battle with the various courts of appeals over the proper deference to which revenue rulings are due". *Estate of McLendon*, 135 F.3d at 1023. In *Davis v. United States*, 495 U.S. 472 (1990), this Court might have applied to Revenue Rulings the view of deference to agency rulings set out in *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *rehearing denied*, 468 U.S. 1227 (1984), but did not. *See* Cohen & Harrington, 51 TAX LAW. at 687. One

scholar has characterized the consequence of this vacuum as "a confusing and erratic judicial process," and observed "in recent years, the federal courts have aggressively embraced a variety of deference standards, which profoundly disturb traditional understandings of the role and weight of revenue rulings." Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 Oh. St. L.J. 1037, 1042 (1995).

One reason the absence of decisions by this Court has created a vacuum is that the issue cannot be resolved by reference to decisions addressing the government agency rulings generally. There, the majority view seems to require a detrimental reliance to raise an estoppel or quasi-estoppel. *See, e.g., Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984); *United States Immigration and Naturalization Service v. Hibi*, 414 U.S. 5 (1973), *rehearing denied*, 414 U.S. 1104 (1973). The different effect of Revenue Rulings has been recognized to flow from section 7805 of the Internal Revenue Code. In addition to the mandate of section 7805(a) to provide needful regulations and rulings, section 7805(b) authorizes changes in rules and regulations to be made prospectively only. Implicit in this authorization is the power not to collect taxes otherwise required by the substantive taxing provisions, such that a taxpayer need not show any injury or detriment other than the payment of a tax the government should not retain. *International Business Machines Corp. v. United States*, 343 F.2d 914 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 1028 (1966).

III. Cases Decided by This Court in the Prior Era No Longer Have Relevance.

Another major reason there is a vacuum of decisions by this Court is that the older cases are no longer of any relevance. The decision of the Tenth Circuit relies upon two obsolete decisions for the proposition that the Commissioner may retroactively correct rulings upon which taxpayers have relied. *See Dixon v. U.S.*, 381 U.S. 68 (1965); *Automobile Club of Michigan v. Comm'r*, 353 U.S. 180 (1957).[2] Both cases involved rulings and tax years during a prior era, when taxpayers were admonished not to rely on them. As explained below, the old administrative scheme has since been changed; *Dixon* and *Automobile Club of Michigan* are no longer determinative or even relevant.

Commencing in 1922, the prefatory language in the Cumulative Bulletin, by which Revenue Rulings are published, warned that Rulings "have none of the force or effect of Treasury decisions and do not commit the Department to any interpretation of law which has not been formally approved and promulgated by the Secretary of the Treasury." 1922 C.B. i.

The tax year addressed in *Dixon* was 1952. 381 U.S. at 70. The Ruling relied on in *Dixon* was issued in 1944. *Id.* at 71 n.2. The prefatory language in the Cumulative Bulletin for both years was the same as it was in 1922. 1952-1

---

[2] The decision also cites *Dickman v. Comm'r*, 465 U.S. 330 (1984), which follows *Dixon*. *Dickman* did not involve reliance on Revenue Rulings, but rather the question of whether the IRS may change an informal practice not embodied in any formal pronouncement. 465 U.S. at 342-343.

C.B. i; 1944 C.B. i. The tax years addressed in *Automobile Club of Michigan* were 1943 and 1944. 353 U.S. at 181. The ruling relied on was issued in 1934, and confirmed by letter in 1938. *Id.* at 182. The prefatory language in the Cumulative Bulletin for each year likewise was the same as it was in 1922. 1944 C.B. i; 1943 C.B. i; 1938-1 C.B. i; 1934-1 C.B. i.

Subsequently, the 1922 disclaimer of reliance was changed to provide a right to rely. The Commissioner characterized the change as "an extremely important departure from previous practice which treated all rulings as mere advisory opinions." Mortimer M. Caplin, *Taxpayer Rulings Policy Of The Internal Revenue Service: A Statement Of Principles*, 20 N.Y.U. INST. FED. TAX'N 1, 6 (1962); *see generally* Benjamin J. Cohen & Catherine Harrington, *Is The Internal Revenue Service Bound By Its Own Regulations And Rulings?*, 51 TAX LAW. 675, 685 (1998).

The Cumulative Bulletin in 1953 abandoned the disclaimer of reliance in favor of an invitation to rely. 1953-1 C.B. i. Twenty years later, in 1973, the invitation to rely was elevated in importance by promulgation of a Treasury Regulation. Treas. Reg. § 601.601(d)(2)(v)(*d*). This Regulation states the affirmative right of reliance that exists today. This case and Revenue Ruling 76-28 are governed by this Regulation, not the decisions issued in a prior era under the old administrative scheme. *Dixon* and *Automobile Club of Michigan* have no application.

In stark contrast to the 1922 disclaimer, the Treasury Regulation since 1973 has explained the purpose of Revenue Rulings to promote compliance by taxpayer reliance, expressly stating they are to be cited and relied

upon by taxpayers and by the IRS in the disposition of cases, and noting that although they may be revoked or modified by a subsequent Ruling, any such subsequent Revenue Ruling ordinarily will not be applied with retroactive effect. *See* Treas. Reg. § 601.601(d)(2).

IV. The Doctrine of *Manhattan General* Has No Application Here Because It Governs Rulings that Erroneously Interpret a Clear Statute; This Is a Case of the Revenue Ruling Implementing an Ambiguous Statute.

This is not a case where an agency ruling conflicts with a clear statute and is a nullity under the doctrine of *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129 (1936). The underlying statute here, without interpretation, is both unworkable and inherently ambiguous. *See* 26 U.S.C. § 404(a)(6).

Section 404(a)(6) was added to the Internal Revenue Code in 1974 to expand the deduction for post-year contributions from accrual basis taxpayers to all taxpayers, placing all employers on a modified cash basis for deducting contributions. It would defy the Congressional intention to apply this provision only to defined contribution plans and not defined benefit pension plans. No one has ever suggested that the provision does not apply to both major types of qualified retirement plans.

But taken literally, section 404(a)(6) of the Code cannot apply to defined benefit pension plans. In defined benefit pension plans, contributions are not made "on account of" any year or employee. Instead, all contributions are pooled to pay all benefits. This is particularly

true of multiemployer defined benefit pension plans, where the contributions of tens of thousands of employers are pooled to pay pensions to hundreds of thousands of employees, and contributions made in respect to one employee will go to benefit other employees, even employees of other employers. *See Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 594 (1993) (Stevens, J., concurring).

Revenue Ruling 76-28, 1976-1 C.B. 106, gave life to the statute and made it workable. By making "on account of" elective for defined benefit pension plans, it found a way for the section to have meaning. Allowing taxpayers to choose the year "on account of" which such contributions are made implements the Congressional intention. It also avoids the unintended result of creating a distinction between defined contribution plans and defined benefit plans where the statute makes none.

Section 404(a)(6) is also inherently ambiguous. It does not address the question, "on account of what?" Does "on account of" address employer contributions or employee benefits?

Multiemployer plan contributions well illustrate the ambiguity. Viewed from the standpoint of employer contributions, multiemployer plans resemble defined contribution plans. Contributions to multiemployer plans usually are measured by work done during the prior month and thus are attached to a period of time. Contributions to defined contribution plans such as profit sharing plans commonly are measured by compensation during the prior year, and likewise attach to a period of time. Viewed from the standpoint of contributions, "on

account of" can have a simplistic, plain language, meaning.

But viewed from the other side, the standpoint of employee benefits, the picture is the opposite. Multiemployer defined benefit pension plans are identical to other defined benefit pension plans. All contributions are alike. They are pooled to pay benefits. In a defined benefit pension plan no contribution is attached to or "on account of" anything. Instead, all contributions are treated in the same manner.

The difficulties of the courts in this case underscore this ambiguity. The Ninth Circuit held that the Code language required the new IRS interpretation in this case to be sustained. *Lucky Stores,* 153 F.3d at 969. So did the Tax Court below, in the identical cases of Petitioner and its subsidiary corporation. *American Stores Company and Subsidiaries v. Commissioner of Internal Revenue,* 108 T.C. No. 12 (1997). *Lucky Stores, Inc. and Subsidiaries v. Commissioner of Internal Revenue,* 107 T.C. 1 (1996). The Tenth Circuit below grappled with the question, applying different reasoning. App. 11-14. But a U.S. District Court took the opposite view in the case later consolidated with Petitioner's subsidiary for oral argument in the Ninth Circuit, sustaining Petitioner's interpretation. *Airborne Freight Corp. v. United States,* No. C95-301R, 1995 U.S. Dist. LEXIS 19822 (W.D. Wash. Nov. 7, 1995), *rev'd,* 153 F.3d 967 (9th Cir. 1998) (App. 163.)

The IRS history over the years, a history that became evident after briefing in this case when the IRS has admitted the truth of its administrative history, also illustrates the ambiguity. The IRS adopted and applied Petitioner's

interpretation of the Revenue Ruling, viewing the Code provision from the standpoint of employee benefits and allowing these deductions, for the first twenty years of the Revenue Ruling. It is only in its litigating position in this case and its companions that the IRS began to advance a different interpretation. The Revenue Ruling that for so long allowed these deductions remains outstanding, not modified and not revoked.

V. Failure to Apply Revenue Rulings Violates Treasury Regulations, Elementary Fairness and Due Process of Law.

Allowing the IRS to dishonor its Revenue Rulings in litigation with taxpayers will give rise to an endless array of issue upon issue likely to plague the lower courts for years. Embedded in the tax law is the principle that the Commissioner "cannot tax one and not tax another without some rational basis for the difference". *United States v. Kaiser*, 363 U.S. 299, 308 (1960) (Frankfurter, J., concurring). Allowing the IRS to avoid its Revenue Rulings in litigation with a taxpayer does violence to this principle. Due process requires that taxpayers identically situated be treated the same, absent a rational basis for the distinction. *Id.* It is an abuse of discretion for the Commissioner to refrain from applying his Revenue Ruling to some taxpayers while others are allowed to rely on it. *See Estate of Shapiro v. Commissioner of Internal Revenue*, 111 F.3d 1010 (2d Cir. 1997), *cert. denied*, 118 S.Ct. 686 (1998). Allowing the IRS to change its interpretation ad hoc, in secret, without process or notice of any kind, not only violates the Treasury Regulation but thwarts the Code mechanism and deprives taxpayers of due process of law.

See 26 U.S.C. § 7805(b); Treas. Reg. § 601.601(d); *see also, Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161-163 (1951) (Frankfurter, J. concurring).

CONCLUSION

The petition for a writ of certiorari should be granted to resolve a conflict among the circuits, to provide guidance to the lower courts as to the force and effect of Revenue Rulings, and to make due process standards applicable when the IRS invites taxpayers to rely on its Revenue Rulings, then declines to apply them.

Respectfully submitted,

PAUL J. SAX
Counsel of Record
ORRICK, HERRINGTON
& SUTCLIFFE LLP
Old Federal Reserve Bank Building
400 Sansome Street
San Francisco, CA 94111-3143
Telephone: (415) 392-1122

Counsel for Petitioner

July 1999

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

AMERICAN STORES COMPANY AND SUBSIDIARIES,	)	
Petitioner-Appellant,	)	
v.	)	No. 97-9025
COMMISSIONER OF INTERNAL REVENUE,	)	(Filed Mar. 9, 1999)
Respondent-Appellee.	)	

APPEAL FROM THE JUDGMENT OF THE UNITED STATES TAX COURT (T.C. NO. 19182-94)

Paul J. Sax (Richard E.V. Harris and Richard A. Gilbert with him on the briefs), Orrick, Herrington & Sutcliffe, LLP, San Francisco, California, for petitioner.

Kenneth L. Greene (Steven W. Parks with him on the brief), Tax Division, United States Department of Justice, Washington, D.C., for respondent.

Before **ANDERSON, HOLLOWAY,** and **BALDOCK,** Circuit Judges.

ANDERSON, Circuit Judge.

American Stores Company and Subsidiaries (American) appeals the decision of the United States Tax Court sustaining the Commissioner's disallowance of deductions on its 1988 tax return for more than 12 months' contributions to qualified multiemployer defined-benefit pension plans, and deductions on its 1987 and 1988 tax returns for certain amounts attributed to vacation pay. It also alleges that the Tax Court erred when it denied American's motions for reconsideration, judicial notice of various administrative materials, and a hearing on those motions. We affirm.

I. BACKGROUND

American Stores is an accrual-method taxpayer, using a 52-53 week taxable year ending on the Saturday nearest the last day of January. Upon audit of its returns for the years 1987 and 1988, the Commissioner of Internal Revenue, among other things, disallowed certain deductions for contributions to multiemployer defined-benefit pension plans for 1988, and for certain alleged vacation pay liabilities for 1987 and 1988. Thereafter, the Commissioner issued a statutory notice of deficiency, proposing additional taxes resulting from these disallowed deductions. American filed a petition in the Tax Court seeking a redetermination of the proposed deficiencies, and the case was submitted on facts which were fully stipulated by the parties.

The Tax Court issued an opinion upholding the position of the Commissioner. *American Stores Co. and Subsidiaries v. Commissioner*, 108 T.C. No. 12 (Mar. 31, 1997). The court held that pension contributions made pursuant to collective bargaining agreements that were based on units of service worked after the close of American's 1988 fiscal taxable year were not "on account of" that year, as required by § 404(a)(6) of the Internal Revenue Code (Code), and therefore were not deductible in that year.[1] In addition, the court held that vacation pay based on units of service worked after the close of American's 1987 and 1988 fiscal taxable years, respectively, had not been "earned" in those years, as required by § 463 of the Code.

On May 30, 1997, American filed a motion for reconsideration and a request for judicial notice of various memoranda, rulings, and other Internal Revenue Service materials allegedly supporting American's position regarding the deductibility of pension plan contributions. Those motions were denied, without a hearing, on June 10, 1997, and the Tax Court entered its decision on October 8, 1997.

On appeal, American reurges the arguments it advanced in the Tax Court, and requests this court independently to take judicial notice of the materials unsuccessfully proffered to the Tax Court after its decision.

---

[1] The court also concluded that American's deductions violated the "individual deduction limits of section 404(a)(1)(A) and section 413(b)(7)." *American Stores*, slip op. at 27. This conclusion was unnecessary to its decision and, as we explain below, incorrect.

II. DISCUSSION

Our review of the issues relating to the pension plan and vacation pay deductions is de novo, requiring only determinations of law. *See Schelble v. Commissioner*, 130 F.3d 1388, 1391 (10th Cir. 1997). Our review of the Tax Court's denial of American's post-trial motions is essentially for abuse of discretion, *see York v. American Tel. & Tel. Co.*, 95 F.3d 948, 958 (10th Cir. 1996) (judicial notice); *Herr v. Heiman*, 75 F.3d 1509, 1515 n.1 (10th Cir. 1996) (reconsideration), although American also contends that under the Federal Rules of Evidence and the Due Process Clause of the Constitution the Tax Court erred as a matter of law in its post-trial rulings, including its refusal to hold a hearing.

A. Pension Plan Contributions

American Stores has filed a motion asking this court to take judicial notice of various documents, including redacted copies of unpublished Private Letter Rulings and unpublished Technical Advice Memoranda issued by the IRS to other taxpayers;[2] documents purporting to identify the taxpayers and pension plans involved; excerpts from IRS manuals and other IRS administrative materials; declarations signed by counsel for American; and legal correspondence with counsel for the Commissioner. American asks us to take judicial notice that these materials demonstrate that IRS administrative practice

---

[2] Some of these rulings and memoranda are already before us in the record as joint exhibits; as regards these documents, judicial notice is unnecessary.

has been consistent with American's position in this litigation, and that the IRS is guilty of various misrepresentations regarding its administrative practice. Because of American's heavy reliance on this material through its briefs and in oral argument, we are constrained to address the motion as a threshold matter.

"A judicially noticed fact must be one not subject to reasonable dispute," in that it is either "generally known" or that it is "capable of accurate and ready determination." Fed. R. Evid. 201(b). American's characterizations of IRS administrative practice are certainly not such facts. Nor are its allegations of misconduct. Furthermore, the rulings and memoranda which allegedly support these supposed facts are themselves inappropriate for judicial notice, in that by their very nature they are unpublished rulings issued to private taxpayers. *See* 21 Charles Alan Wright and Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5106, at 500 (1977) ("ready determination" means source of judicially noticed facts must be "widely available"); *cf. United States v. Judge*, 846 F.2d 274, 276-77 (5th Cir. 1988) (refusing to take judicial notice of excerpts from DEA Manual).

American's request for judicial notice is essentially an attempt to introduce evidence after judgment. As indicated, American argues that the private rulings and memoranda constitute evidence of administrative practice, evidence of the reasonableness of its interpretation of the law, and evidence usable for impeachment and rebuttal. Appellant's Reply Br. at 7-8. If so, it was American's obligation to offer them in evidence in the Tax Court, and to subject them to argument and rulings as part of its case. Judicial notice is "not [a] talisman[ ] by which gaps

in a litigant's evidentiary presentation . . . may be repaired on appeal." *City of New Brunswick v. Borough of Milltown*, 686 F.2d 120, 131 n.15 (3d Cir. 1982); *see also Melong v. Micronesian Claims Comm'n*, 643 F.2d 10, 12 n.5 (D.C. Cir. 1980).

Furthermore, American concedes that the Code prohibits the use or citation of Private Letter Rulings and Technical Advice Memoranda as precedent. *See* I.R.C. § 6110(k)(3). It is well settled that they do not bind the Commissioner or this court. *See ABC Rentals of San Antonio, Inc. v. Commissioner*, 142 F.3d 1200, 1207 n.5 (10th Cir. 1998); *cf. Dickman v. Commissioner*, 465 U.S. 330, 343 (1984). Accordingly, we deny American's motion for judicial notice and decline to consider the proffered rulings and memoranda in evaluating the legal arguments of the parties.

In a related argument, American contends that the Tax Court abused its discretion when it denied American's motions for reconsideration, for judicial notice, and for a hearing, all relating to these same documents and the same arguments based on them made by American here. These were post-trial motions made two months following the Tax Court's opinion. In support, American argued that the material was necessary not only as evidence of administrative practice and the correctness of its legal position at trial, but to rebut allegedly misleading and improper statements by counsel for the Commissioner in a reply brief.

In addition to the same points made above regarding when judicial notice is proper, limitations on the use of private rulings and memoranda, and the obligation to

introduce evidence during trial and not afterward, American's argument has three defects. First, it was generally on notice of the Commissioner's position regarding these rulings prior to the reply brief in question, since the subject was at least broached in the Commissioner's opening brief. *See* R. Vol. I, Doc. 19 at 135. Second, whatever counsel for the Commissioner may have represented or argued in a brief, it was not evidence. It was only argument, and the Tax Court was obligated to treat it as such, i.e., not part of the evidentiary record. Finally, and most significantly, after the Tax Court received the post-trial motions, it was in a position to exercise discretion as to whether, considering the materials, it must reconsider its decision. It did not deem reconsideration warranted, or the materials proper for addition to the trial record after a decision was issued. We decline to call its denial of the motions an abuse of its discretion.

Nor did the court err by refusing to hold a formal hearing on the matter. Fed. R. Evid. 201(e) provides as follows:

> A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

Two factors lead us to conclude that American was not entitled to a hearing as a matter of law. First, the rule by its terms does not specify that the "opportunity to be heard" means, under all circumstances, a formal hearing. Second, although "[t]he Rule as written is not limited to a party who is opposing the taking of judicial notice," 21

Wright & Graham § 5109, at 516, the last sentence of the rule implies special concern with the right to object, which must be honored even after the fact if the court has acted without first notifying the adversely affected party. *See* Fed. R. Evid. 201(e) advisory committee's note. Obviously such a right is not implicated here. Therefore, in the absence of more explicit authority, we do not read the rule to require a court under all circumstances to hold a formal hearing every time a *proponent* of judicial notice so demands. To the extent American as such a proponent had a right to be heard, the court honored that right by duly considering American's briefs, which under the circumstances were sufficient to present its position.

We proceed, then, to our analysis of the issues based upon the evidence of record.

2.

The Code contains special provisions for the tax treatment of "qualified" pension plans, i.e., plans that meet the various requirements of § 401(a). During the years at issue, American made contributions to 39 qualified multiemployer defined-benefit pension plans. By definition, multiemployer plans are maintained pursuant to collective bargaining agreements, and benefit unionized employees. *See* 29 U.S.C. § 1002(37)(A). A multiemployer plan is jointly administered by the involved unions and the participating employers. Each plan pools the contributions of multiple employers on behalf of employees who belong to particular unions, in order to provide funding for a predetermined level of pension benefits. Employers who join multiemployer plans are

statutorily obligated to make the payments required by the corresponding collective bargaining agreements. *See* 29 U.S.C. § 1145.

For all taxable years prior to 1988, American's subsidiaries used one of two methods to calculate pension plan deductions: some would deduct only those contributions actually paid during the taxable year; others would deduct only those contributions corresponding to work done during the taxable year, including one payment made after the close of the taxable year, corresponding to work done during the last month. Under each method, the sum of twelve payments was deducted each year.

For the taxable year ending January 30, 1988, however, American deducted not only the typical twelve payments, but also seven (and in some cases eight) additional payments made after the close of the taxable year, but before the filing of its return on October 17, 1988 (American had applied for and received a filing extension). These additional payments were calculated based on work performed by covered employees after the close of the taxable year. The net result was a one-time tax benefit by accelerating up to eight months of additional deductions, claiming up to twenty months of contributions for the twelve-month fiscal taxable year 1988.

More than 1,000 employers contributed to some of the plans at issue here; other plans were smaller. Generally, at the end of each month, the plan administrators sent bills to participating employers, and employers would calculate their required contributions to each plan by multiplying the units of service (e.g., hours or weeks) worked by covered employees in such month by fixed

monetary rates set by the applicable collective bargaining agreements. *See* H.R.Rep. No. 96-869, at 53 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918, 2921 (under multi-employer pension plans maintained pursuant to collective bargaining agreements, the parties "normally agree to contribute at rates specified in such agreement(s) for hours worked by employees, units of production . . . , or a percentage of compensation"). For example, under its collective bargaining agreement with the Teamsters union, American was required to make contributions at the rate of $0.63 for each hour worked up to a maximum of $25.20 per week per employee. The employers included with payment a list of covered employees, information regarding the number of covered hours of service performed by such employees during the previous month, and the resulting calculations of the amount of the contribution required. Contributions based on services performed within a particular month were due at the end of the following month.

Although there was no provision in any of the collective bargaining agreements providing expressly that American was prohibited from contributing more than the amount required under the agreements, or from contributing amounts in advance of the date that such amounts became due, there also was no provision in the collective bargaining agreements which explained how plan administrators were supposed to handle or credit an advance contribution from an employer. The plan administrator for the Northern California Retail Clerks' Employee Benefit Fund testified that because advance contributions generally were not made, the plan had no established procedures to handle advance contributions,

other than with respect to inadvertent overpayments due to computational errors, and contributions relating to vacation time and severance pay which could be calculated in advance. Other than the exceptions noted, the plan was "not able to handle advance payments," and the administrator had "no knowledge of an employer ever making advance payments." R., Joint Ex. 64-BL at 32. She testified that, because contributions to the plan were based on the number of hours worked in a particular month, which could not be determined in advance, payments to the plan for units of service to be worked in future months by covered employees were "not allowed." *Id.* The payments by American that are at issue in this case were, consistent with the procedures just described, made on a monthly basis, as required by the plans pursuant to the relevant collective bargaining agreements.

3.

The timing of deductions for contributions to qualified pension plans is governed by I.R.C. § 404. The general rule is that they are deductible "[i]n the taxable year when paid," I.R.C. § 404(a)(1)(A), effectively putting all employers on cash-method accounting with respect to such contributions. Unmodified, this rule would prevent some taxpayers from maximizing their contributions (and deductions), because some figures necessary for these computations (such as hours worked by covered employees) are not available until after the close of the taxable year. *See Don E. Williams Co. v. Commissioner*, 429 U.S. 569, 575-76 (1977). To avoid this problem, § 404(a)(6) provides a limited exception:

> For purposes of [§ 404(a)](1), . . . a taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year *if the payment is on account of such taxable year* and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).

I.R.C. § 404(a)(6) (emphasis added). This exception was intended to provide a grace period during which employers could calculate and pay additional contributions for the preceding year. *See Don E. Williams Co.*, 429 U.S. at 574-77 (detailing the history of § 404(a)(6)).

The parties' analytical approaches to this statute, and to the deductibility of the pension plan contributions in question, are galaxies apart. American focuses on the nature of the plan. Unlike defined-contribution plans, which maintain segregated employee accounts, multi-employer defined-benefit pension plans pool all money received and pay benefits according to plan terms. Funds in the pool are not traceable to individual employees or employers, or to the various taxable years of employers participating in the plan. Thus, reasons American, the employee-based terms in American's collective bargaining agreement for calculating monthly payments to the plan are irrelevant, and deductibility is not tied to the concept of monthly obligations paid or accrued through the end of the year.

Under this theory, American could, for example, pay an estimated two or three years of pension contributions (subject to planwide limitations) in advance and deduct them in the year paid since, arguably, payments going into a pool bear no relationship to any particular month

or year. In terms of this case, then, according to American, the fact that twenty (instead of just twelve) monthly payments are deducted in fiscal 1988 is perfectly acceptable. Under this argument, the only role played by § 404(a)(6) is to deem payments made during the grace period for filing the fiscal 1988 return as having been made on January 30, 1988, the last day of the taxable year. The section relates only to timing, not deductibility as such. American asserts that its position is supported by the limitation provisions of § 413(b) of the Code, and explicitly authorized by Rev. Rul. 76-28, 1976-1 C.B. 107.

The Commissioner, on the other hand, contends that § 404(a)(6) is a statute of narrow application, simply permitting time after the close of the tax year to calculate and pay liabilities based on services performed through the year end. It asserts that the plain language of the statute, "on account of such taxable year," compels this conclusion. It also argues that the language and mechanism of the deduction limitation statute, § 413(b)(7), contemplates this result. It asserts support for these arguments from the monthly payment terms, requirements and mechanisms for billing and payment dictated by the collective bargaining agreements applicable to American and its employees, and from the way the pension plan trustees actually handle payments. From this perspective, the Commissioner reasons that the deductibility of American's pension plan payments is limited to the twelve monthly payment obligations under the collective bargaining agreement paid or accrued through the end of the taxable year. Furthermore, the Commissioner disputes American's argument that Rev. Rul. 76-28 permits the deduction in question.

Only one circuit has addressed the issue and disparate conceptual positions presented here, and it held in favor of the Commissioner. *Lucky Stores, Inc. v. Commissioner*, 153 F.3d 964 (9th Cir. 1998). In *Lucky* the Ninth Circuit reasoned that "[t]he bare language" of § 404(a)(6) precluded the deduction of post-taxable year payments required under collective bargaining agreements for hours worked after the close of the taxpayer's taxable year. 153 F.3d at 966. It further determined that these payments did not satisfy Rev. Rul. 76-28 because "the seven or eight contributions in issue were treated by the plans as payments satisfying Lucky's [post-taxable year] obligations." *Id.*

4.

a.

Distilled to its essence, the issue we are asked to resolve is whether the contested pension plan payments are "on account of" American's 1988 fiscal taxable year. The starting point for our analysis is the underlying purpose of § 404(a)(6). As we have explained, qualified pension plan contributions are deductible only within certain limits, and often these limits cannot be calculated until after the close of the taxable year. Section 404(a)(6) allows a grace period during which employers can calculate and make the maximum deductible pension plan contribution. It creates a fiction, by treating a post-taxable year payment as though it were made on the last day of the taxable year. Two other Code sections, dealing with the same need for a grace period and creating the same fiction, use language similar to that employed in

§ 404(a)(6): § 192(c)(3) (deductibility of contributions to black lung benefit trusts) and § 219(f)(3) (deductibility of contributions to individual retirement accounts (IRA's)). Each of these sections deems contributions made before the filing of the taxpayer's return to have been made on the last day of the preceding taxable year, so long as such contributions are "on account of" that taxable year. We interpret § 404(a)(6) in the context of these other provisions.

Section 404(a)(6), like § 192(c)(3) and § 219(f)(3), allows a taxpayer to backdate its grace-period contributions for purposes of complying with deduction limits. Given this function of § 404(a)(6), we conclude that the requirement that grace-period contributions must be "on account of" the taxable year for which they are deducted is simply a demand that the payment fit the fiction. A grace-period payment "on account of" the prior taxable year must, for the purpose of calculating compliance with maximum deduction limits, be treated as though it had been made on the last day of that year.

This is an obvious proposition when viewed in the context of IRA's and § 219, for example. After the end of the taxable year, a taxpayer might use the grace period to calculate the maximum deduction allowed, e.g., $2000. If the taxpayer then made a $2000 contribution to an IRA before filing a return, the taxpayer could choose to designate that payment as "on account of" the previous taxable year, and as a result would subject it to that year's deduction limit (and not the deduction limit for the taxable year in which it was actually paid). Because the taxpayer alone will benefit from contributions to the IRA,

there is usually a tax incentive to contribute the maximum amount deductible each year; the grace period makes this possible to the penny, without the need for guesswork. By the same token, there is absolutely no incentive for such a taxpayer to designate more than $2000 as "on account of" the previous year, because then the previous year's deduction limit would be exceeded.

The picture is similar in the case of an employer's contribution to a single-employer defined-benefit plan, for example. An employer may have discretion to fund within a specific range each year, bounded by a statutory minimum and a statutory maximum. *See* I.R.C. § 412, § 404(a)(1). An employer in such a plan may use the grace period to calculate the acceptable range, choose an amount within that range, and make a deductible payment designated as "on account of" the previous taxable year. Again, the single employer may choose to contribute the maximum, in order to claim a present deduction for funds which will later benefit its employees.

For contributors to multiemployer plans, the situation is similar in principle, but considerably more complex in application. Taking account of the fact that multiemployer plans receive scheduled contributions from numerous employers with differing taxable years, § 413(b)(7) sets up an anticipatory, agglomerative approach to calculating compliance with maximum deduction limits. For a period called the "plan year" (which may or may not coincide with each employer's taxable year), § 404(a) limits are calculated on a planwide basis and compared against anticipated (not actual) contributions for that plan year. Because of its importance to the issue at hand, we set § 413(b)(7) out in its entirety.

> Each applicable limitation provided by section 404(a) shall be determined as if all participants in the plan were employed by a single employer. The amounts contributed to or under the plan by each employer who is a party to the agreement, for the portion of his taxable year which is included within such a plan year, shall be considered not to exceed such a limitation if the anticipated employer contributions for such plan year (determined in a manner consistent with the manner in which actual employer contributions for such plan year are determined) do not exceed such limitation. If such anticipated contributions exceed such a limitation, the portion of each such employer's contributions which is not deductible under section 404 shall be determined in accordance with regulations prescribed by the Secretary.

In other words, some employers whose taxable years differ from the plan year will file tax returns before the end of the plan year. Therefore, planwide compliance with deduction limits for the plan year is determined ex ante. At the beginning of the plan year, working from the terms of collective bargaining agreements and past contribution levels, the plan estimates what contributions it will receive "for such plan year." If that estimate is not greater than the planwide limit, every employer is then free, without any further determination and regardless of subsequent events, to deduct all the contributions it makes "for the portion of his taxable year which is included within such a plan year."

This scheme relies on the fact that, as § 413(b)(7) recognizes, both the timing and amount of actual

employer contributions are determined by the plan, pursuant to the terms of the relevant collective bargaining agreements. Employers make only those payments required by the plan, because their employees receive a predetermined level of benefits independent of the particular amounts contributed by a specific employer. Absent some non-business motive of extraordinary generosity, employers have no incentive to contribute in excess of what is required of them, even if the contributions were deductible, because such contributions would simply be pooled with all other contributions, and would not directly affect the benefits of its own employees.

American argues that the grace-period payments at issue are "on account of" its 1988 fiscal taxable year by the mere fact that they were claimed on its tax return for that year, and that therefore these payments are deemed to have been made on January 30, 1988. It contends that the timing of its own deductions need not coincide with the timing used by the plans to calculate compliance with deduction limits. It argues that once the plans (as required) calculated § 413(b)(7) anticipated contributions "in a manner consistent with the manner in which actual employer contributions for [the] plan year are determined" (i.e., according to units of service rendered during the plan year), and determined that deduction limits were not exceeded for the various plan years containing January 30, 1988, American properly took advantage of that fact by designating seven or eight months of subsequent contributions as having been made on that date. Quoting from the statutory language, it contends that under § 404(a)(6) a payment may be "deemed" made on the last day of an employer's taxable year, even though,

by contrast, the plan calculates § 413(b)(7) compliance according to "actual employer contributions." After all, it argues, the plan year need not coincide with employers' taxable years, and the plan need not and typically does not know the timing of each employer's deductions.

While such a disjunctive framework for limits on employer deductions is possible in theory, and may arguably be culled from the statute by focusing exclusively on certain words, we think a more comprehensive reading of the statute shows that Congress did not intend such an arrangement. Rather, as we have explained, the very purpose of including the "on account of" requirement in a statute such as § 404(a)(6) is to ensure that grace-period deductions claimed for a particular taxable year are in every respect subject to maximum deduction limits in the same way that a contribution made on the last day of the taxable year would be. The "on account of" requirement in § 404(a)(6) demands coordination where American postulates disconnection.

Because § 413(b)(7) requires plans to calculate planwide compliance with maximum deduction limits in advance, employers' contributions are effectively restricted by those limits only if a plan and its contributing employers use a common method for attributing payments to specific plan years and taxable years, respectively. The language of § 413(b)(7) implies such linkage. According to § 413(b)(7), once the plan determines that anticipated contributions "*for* [the] plan year" (calculated by the same method as actual employer contributions "*for* such plan year") are within the planwide limit, "the amounts contributed . . . by each employer . . . *for* the portion of his taxable year which is included within such

a plan year" also satisfy deduction limits. The statutory scheme of § 413(b)(7) and § 404(a) is thus based on the assumption that an employer may deduct as contributions "for" a particular taxable year only those payments anticipated by the plan "for" the corresponding plan year(s). Although plans do not track the timing of employer deductions, a monthly bill means employers are well aware of plan methods for calculating actual contributions, and, therefore, anticipated contributions.

Consequently, an employer's grace-period payment to a multiemployer plan is "on account of" its previous taxable year only if a deduction for that taxable year is consistent with the plan's anticipatory treatment of the payment for purposes of § 404(a) and § 413(b)(7).[3] Each of the plans here was required, pursuant to § 413(b)(7), to calculate "anticipated employer contributions for [the] plan year" containing January 30, 1988, by considering

---

[3] As American correctly notes, however, "the rules for the time a contribution is made for purposes of the minimum funding requirement of section 412 'are independent from' the rules relating to the time a contribution is deemed made for purpose[s][of] claiming a deduction under section 404(a)(6)," effectively refuting the Commissioner's argument to the contrary. Appellant's Reply Br. at 19 (quoting Temp. Reg. § 11.412(c)-12(b)(2) and citing Rev. Rul. 77-82, 1977-1 C.B. 121). Indeed, as Rev. Rul. 77-82 recognizes, this must be so because the grace period under § 412 may be shorter than that under § 404(a)(6), leaving an interval during which a payment may be "on account of" a prior taxable year but attributed to the current year for purposes of minimum funding requirements. By contrast, the § 404(a)(6) grace period is integrally related to the calculation of compliance with maximum deduction limits under § 413(b)(7) (which by its terms affects "[e]ach applicable limitation provided by section 404(a)").

only contributions attributable to services performed during the plan year, consistent with the method used to determine contribution obligations. Thus, as a participant in each of these plans, American may deduct as "on account of" its 1988 fiscal taxable year only those grace-period contributions which were attributable to services performed during its taxable year. The collective bargaining agreements' payment schedules are relevant not because they caused obligations to be accrued during the taxable year,[4] and not because "on account of" always means "on account of services rendered."[5] Rather, the

---

[4] We are unconvinced by the Commissioner's argument that the "on account of" language embodies an accrual requirement. Prior to amendment by § 1013 of the Employee Retirement Income Security Act of 1974, 88 Stat. 923, § 404(a)(6) extended grace-period deductions only to accrual method taxpayers who had incurred a liability before the end of the taxable year. *See Don E. Williams Co.*, 429 U.S. at 575 n.6. By extending the grace period to all taxpayers and by eliminating all references to accrual, we think Congress intended to allow those who have some discretion in the funding of their pension plans (such as in single-employer defined-benefit pension plans, where employers often do not have regularly scheduled funding obligations) to make the calculations necessary to exercise that discretion to its fullest. An accrual requirement would nullify this effect. Furthermore, looking at the similar language in § 219, for example, we do not think Congress intended for grace-period IRA contributions to be deductible only if the taxpayer had some obligation, incurred during the taxable year, to contribute to the taxpayer's own IRA.

Treas. Reg. § 1.404(a)-1(c), which the Commissioner cites in support of an accrual requirement, was last amended in 1963, well before the current version of § 404(a)(6) was enacted.

[5] There is no indication that Congress intended to tie the deductibility of contributions to multiemployer plans to any

statutory scheme makes them relevant by designating "the manner in which actual employer contributions . . . are determined" as the method for calculating compliance with deduction limits.

American contends that "the plan provides the pension liability, not those [collective bargaining agreements]." Oral Arg. Tr. at 8. By minimizing the effect of such agreements it seeks, for purposes of § 404(a)(6), to characterize all multiemployer plans and single-employer defined-benefit plans as birds of a feather. Congress' inclusion of § 413(b)(7), which applies only to collectively bargained plans, directly contradicts American's arguments here and belies American's interpretation of § 404(a)(6). Collective bargaining agreements are a sine qua non of multiemployer plans. While American's pension plan obligations may transcend any particular collective bargaining agreements, Congress in enacting § 413(b)(7) relied on the fact that employers like American make payments on a regularly scheduled basis pursuant to such agreements, as statutorily required – quite unlike the often discretionary funding of many single-employer defined-benefit plans.

---

one method of computing required contributions; multiemployer plans need not use a formula based on units of service rendered (although that was the method used by the plans here). Furthermore, given our observation that the "on account of" language appears in Code sections dealing with IRA's and black lung benefit trusts, we think it must refer to something more general than the performance of services during the taxable year, because contributions to an IRA or to a black lung benefit trust need not be "on account of" any particular services rendered during the taxable year.

American argues that "Congress [i]ntended [s]ection 404(a)(6) to [a]pply to [a]ll [p]lans," Appellant's Br. at 32, and that disallowing the deductions in question negates the application of § 404(a)(6) to contributions to multiemployer plans. Here American attacks a straw man of its own making. The Commissioner does not argue that Congress intended to exclude multiemployer contributions from § 404(a)(6). In fact, the Commissioner (properly) conceded that American's February 1988 payments were "on account of" it [sic] taxable year ending January 30, 1988, because they corresponded to work done during January 1988. It is American's position that would treat multiemployer plans differently from other plans, by automatically allowing virtually unlimited deductions to fit under entirely disjunctive deduction limits.

American's arguments would make any grace-period contribution to a multiemployer plan deductible. As we have emphasized, the argument flies in the face of the entire purpose for a grace period. Congress enacted § 404(a)(6) because the predicate facts required for § 404(a) calculations are sometimes known only at the very end of the taxable year. The grace period is simply for making these calculations based on facts existing at the close of the taxable year. The precise amounts of the payments American seeks to deduct here were based on predicate facts (i.e., hours worked during particular post-taxable year months) which did not exist at the end of the taxable year.

b.

American argues that Revenue Ruling 76-28 requires a contrary result. That ruling provides as follows:

> Whether a taxpayer is on the cash or accrual method of accounting, and whether or not the conditions for accrual otherwise generally required of accrual basis taxpayers have been met, a payment made after the close of an employer's taxable year to which amended section 404(a)(6) applies shall be considered to be on account of the preceding taxable year if (a) *the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer,* and (b) either of the following conditions are satisfied.
>
> (1) The employer designates the payment in writing to the plan administrator or trustee as a payment on account of the employer's preceding taxable year, or
>
> (2) The employer claims such payment as a deduction on his tax return for such preceding taxable year. . . .

Rev. Rul. 76-28, 1976-1 C.B. 107 (emphasis added).

In analysis peppered with citations to Private Letter Rulings and the like, American interprets Rev. Rul. 76-28 to mean that the additional seven or eight payments deducted on its 1988 return were proper because "[a]ll [p]ayments to [d]efined [b]enefit [p]lans are [t]reated the [s]ame." Appellant's Br. at 35. It emphasizes that contributions to defined-benefit plans are pooled. Unlike defined-contribution plans, defined-benefit plans do not segregate funds into individual employee accounts; the

benefits ultimately received by an employee are fixed by the terms of the plan, and do not depend on the gains and losses on a segregated, individual account. From these characteristics, it reasons that *a fortiori* all contributions to a multiemployer defined-benefit plan are "treated by the plan in the same manner."

We note initially that Rev. Rul. 76-28's "same treatment" requirement is hardly pellucid, notwithstanding American's reference to "[t]he plain meaning of Revenue Ruling 76-28." Appellant's Br. at 35. Whatever it means, it must mean more than the extremely narrow interpretation American has given it. There is no indication in the ruling that "same treatment" is limited only to certain purposes, or, specifically, that it refers only to the calculation of benefits. American offers no convincing reason why the calculation of employee benefits should completely control the question of the deductibility of employer contributions.

Rev. Rul. 76-28 demands that in order for an employer to deduct a payment as "on account of" its previous taxable year, the plan itself must treat the payment as though it were made on the last day of that taxable year. At the very least this means a multiemployer plan must so treat the payment for purposes of calculating compliance with § 413(b)(7), given that the very purpose of the "on account of" requirement is to assign payments to particular time periods for purposes of maximum deduction limits. As we have explained in our analysis of the statute, this requirement was not satisfied, and therefore Rev. Rul. 76-28 supports our decision.

American protests that it is entitled to rely on any reasonable interpretation of a Revenue Ruling, relies on Technical Advice Memoranda and Private Letter Rulings as "conclusive evidence of reasonableness," Appellant's Reply Br. at 10, and cites *Estate of McLendon v. Commissioner*, 135 F.3d 1017 (5th Cir. 1998). First, as indicated above, American did not attempt to introduce most of this "evidence" at trial and subject it to analysis and rulings on admissibility by the Tax Court, and we will not consider it for the first time on appeal. In any event, American was not entitled to rely on the unpublished memoranda or rulings for an interpretation of a Revenue Ruling when receiving tax advice on how to plan its own tax strategy.[6] American offers no reason why it could not have applied for its own ruling. Second, the very fact that American argues for reliance on a "reasonable" interpretation of the Revenue Ruling demonstrates the weakness of its position. Taxpayers are not entitled to fashion their own beneficially strategic, slanted interpretations. Thus the case before us differs from *McLendon*, which involved a Revenue Ruling which, in the court's view, "state[d] a clear standard, expressed in language and example unneedful of further interpretation," and which "undeniabl[y]" supported the taxpayer's position. 135 F.3d at 1023. Third, even if Rev. Rul. 76-28 were crystalline, "Revenue [R]ulings do not have the force and effect

---

[6] Alleging the lone fact that other employers have obtained private rulings supporting deductions similar to those disallowed here, American argues that the IRS has imposed impermissibly disparate treatment. This is essentially a recasting of American's argument for reliance on private rulings, which we reject.

of law, but rather are offered for the guidance of taxpayers, IRS officials, and others concerned; although they are entitled to some consideration, they do not control when contrary to statute or the expressed intention of Congress." *Storm Plastics, Inc. v. United States*, 770 F.2d 148, 154 (10th Cir. 1985); *see Dixon v. United States*, 381 U.S. 68, 73-75 (1965). Fourth, "neither the duty of consistency, nor the principles of equitable estoppel . . . preclude [the Commissioner] from correcting mistakes of law in the imposition and computation of tax liability, including the power to retroactively correct his rulings, regulations and decisions upon which taxpayers have relied." *Massaglia v. Commissioner*, 286 F.2d 258, 262 (10th Cir. 1961) (citing *Automobile Club of Michigan v. Commissioner*, 353 U.S. 180 (1957)). We repeat the admonition of the Supreme Court:

> Even accepting the notion that the Commissioner's present position represents a departure from prior administrative practice, which is by no means certain,[7] it is well established that

---

[7] American characterizes the IRS' administrative practice as "a consistent series of TAMs and PLRs spanning . . . decades" that "uniformly state [American's] position in this case, in every ruling, on every issue." Appellant's Reply Br. at 9, 10. The administrative history is not as clear as American claims, and certainly not clear enough to support any kind of reliance interest. First of all, by American's own count, only three private rulings squarely support its position – not exactly a decades-long history of consistent administrative practice. Second, one letter ruling cited by American applied Rev. Rul. 76-28 to approve deductions for post-taxable year contributions that were "treated by the [p]lans *for tax purposes* in the same manner that the [p]lans would treat a payment actually received on the last day of [the taxpayer's preceding] taxable year."

> the Commissioner may change an earlier interpretation of the law, even if such a change is made retroactive in effect. This rule applies even though a taxpayer may have relied to his detriment upon the Commissioner's prior position.

Dickman v. Commissioner, 465 U.S. 330, 343 (1984) (footnote & citations omitted). American's "taxpayer reliance" argument, which is essentially a dressed-up estoppel argument, runs counter to well-established law.

c.

In clarification, we note that while we affirm the judgment of the Tax Court, and while we agree with much of its analysis and with its conclusion that American's position would frustrate the purposes of § 404(a) and § 413(b)(7), we disagree with its opinion to the extent it holds that American's grace-period deductions "fail[ ] to comply with the individual deduction limits of section 404(a)(1)(A) and section 413(b)(7)." *American Stores*, slip op. at 27. American correctly points out that there are no such "individual" limits under § 413(b)(7); limits are calculated on a planwide basis, and no planwide limit was exceeded here. However, it is precisely these mechanics of § 413(b)(7) which compel the conclusion that

---

P.L.R. 80-42-133 (July 25, 1980) (emphasis added). Furthermore, many private rulings interpreting the "on account of" requirement and Rev. Rul. 76-28 are qualified by prominent references to the applicability of deduction limits. *See, e.g.*, T.A.M. 85-43-002 (Apr. 30, 1985); P.L.R. 82-27-068 (Apr. 9, 1982); P.L.R. 80-42-133 (July 25, 1980). This reflects a subordination of the § 404(a)(6) grace period to the larger purpose of effective deduction limits, a view in tension with American's arguments.

§ 404(a)(6) contributions must be determined in a manner consistent with the calculation of anticipated contributions. Consequently, we agree with the Tax Court that American may not "includ[e] contributions in its tax year in a manner at odds with how anticipated contributions previously had been determined for the plan year in which [the last day of] its tax year falls." *American Stores*, slip op. at 29. This is not, however, because § 413(b)(7) itself disallows the deductions on an employer-by-employer basis; it is because American's interpretation of § 404(a)(6) would allow individual employers to distort the application of § 413(b)(7).

d.

In sum, although our reasoning differs in some respects, we follow the Tax Court and the Ninth Circuit in concluding that § 404(a)(6) provides no basis for the bunching of deductions for scheduled contributions to multiemployer pension plans.[8] The deductions at issue here were properly disallowed.

B. Vacation Pay

Under American's "General Plan," employees receive paid vacation in amounts corresponding to their years of service. The amount of vacation available to an employee during a particular calendar year is based on the number of years the employee will have worked as of the hiring

---

[8] Because we agree with the denial of the deductions at issue, we need not reach the Commissioner's argument that American changed its method of accounting.

anniversary contained in that year. During the calendar year in which employees reach the second anniversary of their hiring date, they may take two weeks of paid vacation; in the calendar year of the fifth anniversary, three weeks are allowed; and so on.

Those who have been continuously employed by the company during the prior calendar year may take the full amount of vacation for the current year at any time during the calendar year. They need not wait until the date of the hiring anniversary upon which the amount is based. However, employees who take vacation and then terminate employment prior to their hiring anniversary must repay that portion of the vacation pay corresponding to the time remaining until the hiring anniversary. For example, an employee hired in December 1986 could take two weeks of vacation in January 1988, but if that employee then quit in March 1988 the employee would have to repay approximately 3/4 of the vacation pay.

For the taxable years ending January 31, 1987, and January 30, 1988, American deducted the entire amount of vacation pay which its employees were allowed to take as of January 1 of each year, including that portion still subject to repayment requirements. The Commissioner disallowed deductions for that portion of benefits which employees would have to repay if they did not continue employment beyond the end of the taxable year. The Tax Court upheld the disallowance, holding that the benefits had not yet been earned by employees.

In defense of its deductions American cites former I.R.C. § 463,[9] which states in relevant part:

> (a) *Allowance of Deduction.* – At the election of a taxpayer whose taxable income is computed under an accrual method of accounting, if the conditions of section 162(a) are otherwise satisfied, the deduction allowable under section 162(a) with respect to vacation pay shall [include]
>
> > (1) a reasonable addition to an account representing the taxpayer's liability for vacation pay earned by employees before the close of the taxable year. . . .
>
> Such liability for vacation pay earned before the close of the taxable year shall include amounts which, because of contingencies, would not (but for this section) be deductible under section 162(a) as an accrued expense. . . .

American argues that vacation pay is "earned" as soon as employees are entitled to take it, and that the possibility of repayment is simply a contingency which would otherwise bar accrual but which does not affect deduction under § 463.[10]

---

[9] Section 463 was repealed by § 10201(a) of the Omnibus Budget Reconciliation Act of 1987, Pub.L. No. 100-203, 101 Stat. 1330.

[10] The Commissioner contends that American did not make this argument to the Tax Court and that therefore we cannot consider it. We disagree. Although American's argument here differs in emphasis from some of the arguments it made below, both the Tax Court and the Commissioner understood American's arguments to include the assertion that allowing employees to take vacation is sufficient to make that vacation

We find this definition of "earned" unpersuasive. Earnings are not required to be repaid. The benefits at issue were at best advances or loans of vacation pay which employees were expected to earn during continued employment. Although it is clear from the statutory language that for purposes of deductibility Congress intended to disregard contingencies which would prevent *earned* benefits from being *accrued*, the possibility of repayment is not such a contingency. Rather, American's repayment requirement prevents the vacation pay at issue from being "earned" in the first place.

American notes that one of the contingencies which Congress expressly took into account in drafting § 463 was "termination of employment before vacation time arrives." S.Rep. No. 93-1357 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7478, 7479. It contends that this shows that Congress intended to allow the deductions at issue here, where employees must repay advance vacation benefits if they terminate employment.

Contrary to American's claims, its position is not compelled by the legislative history it cites, and would undermine the requirement that vacation pay be earned

---

"earned" and therefore deductible. The Commissioner argued that "[n]othing in the statutory language of I.R.C. § 463 or the legislative history . . . suggests . . . that a vacation pay accrual is considered to be 'earned' simply because the employer permits its employees to actually take vacations." R. Vol. II, Doc. 21 at 87. The Tax Court summarized the Commissioner's opposition to American's argument thus: "Respondent, on the other hand, contends that nothing in section 463 signals that vacation pay is earned simply because the employer permits its employees to take vacations." *American Stores*, slip op. at 40.

in the year of deduction. While we agree with American that § 463 permits a deduction for a category of vacation pay which may be characterized as "earned" but "contingent" on continued employment, the pay at issue is not such an amount. Rather, such amounts would include vacation pay attributable to work done during the taxable year, but which employees were not eligible to take until after the end of the taxable year, and which they would lose if they were terminated prior to attaining such eligibility.

Thus we conclude that Congress intended to allow a deduction for vacation benefits corresponding to work done during the taxable year, whether or not employees were eligible to take the vacation during the taxable year, and even though termination of employment before such eligibility might mean the employer would never actually pay those benefits. American's position is directly contrary, asserting deductions for vacation pay which employees were eligible to take during the taxable year but which corresponded to work done after the taxable year. We therefore find no support in § 463 for American's deductions.

Accordingly, the judgment of the United States Tax Court is AFFIRMED.

UNITED STATES COURT OF APPEALS
Tenth Circuit
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80294
(303) 844-3157

Patrick J. Fisher, Jr.
Clerk

Elisabeth A. Shumaker
Chief Deputy Clerk

March 23, 1999

TO: ALL RECIPIENTS OF THE OPINION

RE: 97-9025, *American Stores v. CIR*
Filed on March 9, 1999

The slip opinion filed on March 9, 1999, contains two typographical errors. On page 6, the first sentence of the last paragraph should read:

> Furthermore, American concedes that the Code prohibits the use or citation of Private Letter Rulings and Technical Advice Memoranda as precedent. *See* I.R.C. § 6110(k)(3).

On page 15, the third sentence of the first paragraph should read:

> It also argues that the language and mechanism of the deduction limitation statute, § 413(b)(7), contemplates this result.

A copy of the corrected opinion is attached.

Sincerely,
Patrick Fisher, Clerk of Court

By: Keith Nelson
Deputy Clerk

encl.

108 T.C. No. 12

UNITED STATES TAX COURT

AMERICAN STORES COMPANY AND SUBSIDIARIES, Petitioner *v.* COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 19182-94. Filed March 31, 1997.

P made contractually required monthly contributions to 39 multiemployer pension plans. P also provided vacation pay benefits to its employees under various plans. For its TYE Jan. 31, 1987 (8701), P obtained an extension of the time within which to file its U.S. consolidated corporate income tax return to Oct. 15, 1987. For its TYE Jan. 30, 1988 (8801), P obtained an extension of the time within which to file its U.S. consolidated corporate income tax return to Oct. 17, 1988. On its return for TYE 8801 P deducted, in addition to the 12 monthly contributions based on units of service worked during the taxable year, contributions based on units of service worked during months after the last day of TYE 8801 but before the due date of the return as extended. On its returns for TYE 8701 and TYE 8801 P also deducted, in addition to its vacation pay liabilities based on units of service worked during those years, vacation pay liabilities based on units of service worked during months after the last days of the taxable years but before the due dates of the returns as extended.

1. *Held:* pension contributions, based on units of service worked after the close of TYE 8801 and before Oct. 17, 1988, were not on account of P's TYE 8801, as required by sec.

404(a)(6), I.R.C., and are therefore not deductible in that year. *Lucky Stores, Inc., & Subs. v. Commissioner*, 107 T.C. 1 (1996),

2. *Held, further,* vacation pay, based on units of service worked after the close of TYE 8701 or TYE 8801 and before the due date of the return for such year as extended, was not earned in TYE 8701 or TYE 8801, as required by sec. 463(a)(1), I.R.C., and is therefore not deductible in such year.

Frederick J. Gerhart, Thomas E. Doran, Stephen DiBonaventura, and *Scott D. Price,* for petitioner.

Thomas R. Lamons, C. Glenn McLoughlin, and *David L. Miller,* for respondent.

OPINION

NIMS, *Judge:* Respondent determined the following deficiencies in petitioner's Federal income tax:

Taxable year ending (TYE)	Deficiency
February 2, 1985	$3,704,320
February 1, 1986	726,452
January 31, 1987	43,266,274
January 30, 1988	29,480,791

Unless otherwise indicated, all section references are to sections of the Internal Revenue Code in effect for the years at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

After concessions, the following 2 issues remain for us to resolve in the present proceeding: (1) Whether petitioner, in its taxable year ending January 30, 1988 (TYE 8801), properly deducted certain contributions to

multiemployer pension plans attributable to services performed after the conclusion of that tax year, and (2) whether petitioner properly deducted certain vacation pay liabilities pursuant to section 463 in its taxable year ended January 31, 1987 (TYE 8701) and in TYE 8801. The amount of the disputed pension contribution deduction is $37,839,040.20. The amounts of the disputed vacation pay deductions are $24,171,499 in TYE 8701 and $17,927,808 in TYE 8801.

The facts have been fully stipulated and are found accordingly. This reference incorporates the stipulated facts and attached exhibits.

Petitioner is a Delaware corporation. At the time the petition was filed, petitioner's principal place of business was located in Salt Lake City, Utah.

Background

Petitioner is the common parent of an affiliated group of corporations, and files a consolidated Federal income tax return annually. Petitioner filed the petition on behalf of all eligible members of the group. For Federal income tax purposes, petitioner elected to file corporate income tax returns on the basis of a 52-53 week fiscal year ending on the Saturday nearest January 31 of any given year. Petitioner requested and received an extension to October 15, 1987, to file its United States consolidated corporate income tax return for TYE 8701. Petitioner requested and received an extension to October 17, 1988, to file its United States consolidated corporate income tax return for TYE 8801.

Petitioner, through its subsidiaries, primarily engages in the retail sale of food and drug merchandise. Conjointly, the subsidiaries represent one of the nation's leading retailers, operating combination drug/food stores, super drug centers, drug stores and food stores. During the years in question, petitioner conducted its principal business activities through wholly owned subsidiaries and operating divisions, including: Acme Markets, Inc., Jewel Food Stores, Star Market, Jewel OSCO, Alpha Beta Company, Skaggs Alpha Beta, and Buttrey Food.

Respondent issued a statutory notice of deficiency on July 26, 1994. After stipulations of agreement executed by the parties, the remaining issues are: (1) Whether petitioner can deduct in TYE 8801 certain contributions made to various multiemployer pension plans in the months after January 30, 1988, but before the extended due date for filing its return, and (2) whether petitioner is entitled to certain vacation pay accrual adjustments pursuant to section 463 for TYE 8701 and TYE 8801.

I. The Deductions for Contributions to Collectively Bargained Plans

Under applicable Internal Revenue Code provisions, employers may enter into "qualified" deferred compensation arrangements, which provide retirement and other benefits to employees and their beneficiaries through single employer plans, multiple employer plans, and multiemployer plans. Plans not established pursuant to collective bargaining agreements are herein referred to as Multiple Employer Plans. Plans established and maintained pursuant to such agreements are henceforth

referred to as Multiemployer Plans or, alternately, as CBA Plans. In both Multiple Employer Plans and Multiemployer Plans, the contributions of participating employers are pooled and used to provide benefits to all covered employees, former employees, and their beneficiaries. Section 413(b) contains certain rules exclusively applicable to CBA Plans, which are the plans involved in the instant case.

At all relevant times, petitioner was obligated to contribute money to 39 CBA Plans. These plans were defined benefit pension plans. By stipulation of the parties, arguments were limited to the 10 plans to which petitioner contributed the largest amounts in TYE 8801 (the Top 10 Plans). The parties have agreed to apply the Court's decision with respect to the Top 10 Plans to petitioner's contributions to the other 29 plans. The following schedule sets forth the the Top 10 Plans and their respective annual accounting periods (plan years) for Federal tax purposes:

CBA Plan	Plan Year
Southern California UFCW Union & Food Employers Joint Pension Trust Fund	April 1 – March 31
UFCW Union and Participating Food Industry Employers Tri-State Pension Fund	January 1 – December 31
Northern California Retail Clerk Union & Food Employers Joint Pension Trust Fund	January 1 – December 31

Southern California Meat Cutters Union & Food Employers Pension Trust Fund	July 1 – June 30
UFCW Union Local 56 Retail Meat Pension Fund	July 1 – June 30
UFCW International Union Industry Pension Fund	July 1 – June 30
Western Conference of Teamsters Pension Trust	January 1 – December 31
Southern California Retail Clerks Union & Drug Employers Pension Fund	January 1 – December 31
Warehouse Employees Union Local 169 & Employers Joint Pension Fund	January 1 – December 31
UFCW Local 72 & Participating Employers Pension Fund	January 1 – December 31

During the calendar years 1986, 1987, and 1988, more than 1,000 employers made contributions on behalf of thousands of unionized employees and their beneficiaries to many of the plans. Other plans were smaller. At all times between January 1, 1986 and December 31, 1988, each of the plans qualified as a Multiemployer Plan within the meaning of the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. 93-406, 88 Stat. 829 and was a plan to which section 413(b) and Subtitle E of Title IV of ERISA applied. Moreover, at all times during this period, each of the plans qualified under section 401(a) as a pension plan, and, accordingly, the trusts related to each CBA Plan were exempt from taxation under section 501.

Generally, at the end of each month, petitioner calculated the amount of its required contribution to each CBA Plan by multiplying the hours or weeks (units of service) worked by covered employees in such month by fixed monetary rates (the contribution rate) set by the collective bargaining agreement. Increases or decreases in the number of covered employees, along with increases or decreases in the units of service worked by covered employees, required petitioner to make a separate calculation for its required contribution to each plan every month. Contributions to each CBA Plan attributable to units of service worked in a given month were due on the 30th of the month after the units of service were worked. On occasion, contributions to plans were made on a quarterly basis, based upon covered services performed during the quarter.

For taxable years prior to TYE 8801, petitioner's subsidiaries computed their deductions for plan contributions in one of 2 ways. Skaggs Alpha Beta and Jewel Food Stores (for one of the plans to which it contributed) calculated the contributions paid to the plans during the corporations' taxable years (regardless of when the covered services related to the contributions were performed) and claimed that total as their deduction. Alpha Beta Company, Osco Drug Company, Acme Markets, and Jewel Food Stores (for the other plans to which it contributed) calculated the contributions related to covered services performed during their taxable years (regardless of when those contributions were paid) and claimed that total as their deduction. For each subsidiary, and for each taxable year ending prior to petitioner's TYE 8801, the total amount claimed as a deduction for that year did not

include any contributions attributable to covered services performed after the end of that taxable year.

For TYE 8801, Skaggs Alpha Beta (for the plans to which it contributed) and Jewel Food Stores (for one of the plans to which it contributed) computed their deductions for contributions to the plans claimed on petitioner's Federal income tax returns by adding together the contributions actually made during TYE 8801 and those contributions made after the end of TYE 8801, but before the due date for filing petitioner's return (i.e., October 17, 1988). Jewel Food Stores calculated its deduction for contributions to 2 other plans by adding together contributions calculated with reference to covered services performed in TYE 8801 and those contributions calculated with reference to covered services performed after TYE 8801 that were made before the due date for filing petitioner's return. Alpha Beta Company, Osco Drug Company, and Acme Stores each calculated its deduction for contributions to the plans by adding together the contributions made with reference to covered services performed in TYE 8801 and those contributions which were related to covered services performed after TYE 8801 and were made after the end of TYE 8801 but before the due date for filing petitioner's return. Petitioner claimed a deduction for contributions to the plans of $101,787,413. Of that amount, $57,607,463 was reflected on petitioner's books as a TYE 8801 expense, and $44,179,950 was reflected on Schedule M-1 as an adjustment to petitioner's book income.

Of the $44,179,950 deducted by petitioner on the Schedule M-1, $116,285 pertained to amounts contributed by Skaggs Alpha Beta and Star Markets in February 1988

(and thus was attributable to covered services performed during TYE 8801). The remaining $44,063,665 deducted by petitioner on Schedule M-1 related to covered services performed after the end of TYE 8801.

For taxable years after TYE 8801, petitioner reported deductions based upon contributions attributable to covered services performed during the taxable year (but not previously deducted for tax purposes), as well as contributions attributable to covered services performed after the close of the taxable year, where the contributions were made before the filing date for petitioner's Federal income tax return. In contrast to TYE 8801, for taxable years before and after TYE 8801, petitioner deducted only contributions calculated with reference to covered services performed over a 12-month period. At no time did petitioner file a Form 3115 (Application for Change in Accounting Method) concerning the method used to arrive at its deduction for contributions to the plans claimed on its return for TYE 8801.

In her notice of deficiency, respondent disallowed the $44,179,950 Schedule M-1 adjustment upon determining that petitioner could not properly deduct contributions attributable to covered services performed after the close of the taxable year as so-called grace period contributions. Respondent did not disallow the $57,607,463 deduction representing contributions made by petitioner to the plans attributable to covered services performed during TYE 8801.

The parties subsequently agreed that petitioner improperly calculated the amount of the "grace period contributions". Petitioner admits that it overstated its

deduction for "grace period contributions" by $6,224,901.16, and acquiesces in the adjustments made by respondent to that extent. Thus, after that concession, the amount remaining in dispute in regard to contributions made by petitioner after January 30, 1988, and before October 15, 1988, was $37,955,325.20. Respondent concedes that contributions in the amount of $116,285 (which were attributable to amounts contributed by Skaggs Alpha Beta and Star Markets in February 1988 for covered services performed in January 1988) were properly deductible. As a result, the portion of the "grace period contributions" remaining at issue is $37,839,040.20.

The administrator of each plan was a party independent of petitioner and was appointed by the Board of Trustees of the plan. Under the terms of the collective bargaining agreements, the plans were entitled to collect interest and/or late fees on delinquent contributions from employers. At all times during the relevant period, each CBA Plan administrator had procedures to monitor the actual dates of receipt of each employer's required contribution.

As required by ERISA sections 104 and 4065, 88 Stat. 847, 1032, and sections 6057(b) and 6058(a), after the close of each plan year the administrator of each CBA Plan filed Annual Reports (Forms 5500) and accompanying schedules with the IRS. On Schedule B of Form 5500, each CBA Plan reported for its plan year only those contributions paid under the applicable agreement for units of service worked during that particular year. Only a defined benefit plan subject to the minimum funding standards of section 412 and ERISA section 302, 88 Stat. 869, is required to file a Schedule B. One purpose of the

completion of the Schedule B is to demonstrate compliance or noncompliance with such minimum funding standards. At all times during the relevant periods, each CBA Plan satisfied the minimum funding requirements of section 412 and ERISA section 302. Petitioner's subsidiaries' monthly contributions to each CBA Plan were reported on Schedule B for that plan year in which the related units of service of the covered employees had been worked.

While nothing in the collective bargaining agreements prohibited petitioner from contributing more than the amount required, or contributing amounts in advance of the date that such amounts became due, no provision explained how the plan administrator should credit an advance contribution from an employer. Generally, advance pension contributions were not made to the plans and, with the exception of advance contributions made with respect to vacation time and severance pay, petitioner did not make any such contributions during the taxable years at issue. No contributions were made by petitioner to any of the CBA Plans during the relevant period that were not required by collective bargaining agreements.

Petitioner's subsidiaries, for public financial reporting purposes, accounted for their contributions to the CBA Plans in one of 2 ways. Skaggs Alpha Beta (for the plans to which it contributed) and Jewel Food Stores (for one of the plans to which it contributed) calculated contributions paid to the plans during the corporations' taxable years (regardless of when the covered services related to the contributions were performed) and included that total as their contributions expense. For the

other plans to which Jewel Food Stores contributed, and for the plans to which Alpha Beta Company, Osco Drug Company, and Acme Markets contributed, the contributions related to covered services performed during the corporations' taxable years were treated as contributions expenses (regardless of when those contributions were paid). For each of the subsidiaries, and for each taxable year, the amount included as a contributions expense did not include contributions attributable to covered services performed after the end of the taxable year.

The taxable year of a contributing employer need not match the plan year of a plan to which such employer contributes. Administrators of Multiemployer Plans are not cognizant of the taxable years adopted by contributing employers. Moreover, under the terms of the collective bargaining agreements, petitioner was not required to report to the plan administrators the deductions it claimed for contributions.

In preparing its funding standard account under section 412 for each plan year, no CBA Plan considered contributions made by contributing employers for hours worked by covered employees following such plan year. Under each CBA Plan for all relevant periods, the earning, crediting, and vesting of a participant's benefit remained independent of the making of any specific contribution of an employer.

The parties stipulated that, if called to testify by petitioner, the employee of petitioner most familiar with its subsidiaries' contribution obligations to each of the plans would state that, as of January 31, 1988, he had no

reason to believe that the amount of any of the subsidiaries' monthly contribution obligation to any such plan would significantly decrease in the 8-month period following January 31, 1988. Furthermore, the amount of total employer contributions actually paid to each of the plans relating to covered services performed during each plan year is an amount which the plan administrator could have, as of the beginning of such plan year, reasonably anticipated to be made by employers with respect to covered services performed during such plan year.

Petitioner consulted with an accounting firm, Ernst & Whinney, about accelerating deductions for contributions to the CBA Plans made after the end of a tax year and before the due date of the tax return for that year (herein for convenience referred to as grace period contributions). The parties stipulated that Ernst & Whinney marketed this type of acceleration to certain clients that were making required contributions to multiemployer defined benefit pension plans during this period.

Petitioner was never notified by any plan representative that the statutory deduction limit was exceeded with respect to any plan for any relevant period. Petitioner did not notify any plan representative that the monthly contributions calculated with reference to covered services performed after January 31, 1988, were to be applied to months ending on or before January 31, 1988.

II. The Vacation Pay Deductions

Petitioner provides many of its approximately 130,000 employees with job-related benefits, including vacation pay and other types of compensated leave. A

number of factors determine the type and amount of vacation pay available to an employee, such as: (1) The employing company; (2) the employee's job classification; (3) the employee's tenure with the employing company; and (4) the employee's status as a union or non-union worker.

Petitioner deducted $78,110,485 attributable to its vacation pay liability on its return for TYE 8701, $24,171,499 of which is in dispute in the instant case (the 1987 Vacation Pay). Petitioner deducted $62,841,617 attributable to its vacation pay liability on its return for TYE 8801, $17,927,808 of which remains in dispute (the 1988 Vacation Pay).

A. The Terms of the Vacation Benefits Plans

Petitioner provided vacation pay benefits to its employees under three basic plans: (1) The American Stores Co. general vacation plan and other plans providing similar benefits (herein collectively referred to as the General Plan); (2) the Star Markets Non-Union Plan (the Star Markets Plan); and (3) the Acme Markets Union Plans (the Acme Markets Plans).

1. The General Plan

The General Plan is the vacation benefit plan most widely used by petitioner. Under this plan, once a covered employee reaches the first anniversary of his initial hire date, he has the right to take one week of paid vacation. Following an employee's first year of continuous service, the plan operates somewhat differently. As

of each January 1, an employee's vacation pay benefits are determined based on the next anniversary of his initial hire date. This calculated amount is referred to as the employee's "leave entitlement". Only those individuals continuously employed by petitioner for the 12-month period ending on December 31 of each year obtain a leave entitlement. The General Plan permits an employee to take his entire leave entitlement as of January 1. Thus, for example, an employee who worked for petitioner since July 1, 1985, had the right to take 1 week of vacation upon reaching July 1, 1986. On January 1, 1987, the same employee was able to take 2 weeks of leave, since the employee was expected to have 2 years of service by July 1, 1987.

The following schedule reflects the leave entitlement available to employees under the General Plan:

Salaried

1 week after 1 year of service
2 weeks after 2 years of service
3 weeks after 5 years of service
4 weeks after 10 years of service
5 weeks after 20 years of service

Hourly

1 week after 1 year of service
2 weeks after 2 years of service
3 weeks after 5 years of service
4 weeks after 12 years of service
5 weeks after 20 years of service

The General Plan calculates years of service using the anniversary of an employee's date of hire (the anniversary date). The plan uses an employee's job category (salaried or hourly worker) as of January 1 of each year to calculate the amount of the employee's leave entitlement for the calendar year. Leave entitlements generally must be used by the end of the calendar year; no full week increments of leave may extend beyond that time. Moreover, employees do not receive compensation for the portion of their leave entitlement which remains unused at the end of the calendar year.

Leave entitlement for employees covered by the General Plan vests ratably over the 1-year period between successive anniversary dates. Consequently, an employee's leave entitlement as of January 1 normally includes both vested and nonvested portions. The vested portion is coextensive with services which have already been performed by the employee. The nonvested portion of the leave entitlement will vest (on a weekly or monthly basis) as future services are performed by the employee. Thus, an employee with an anniversary date of July 1 of a given year will be vested in one-half of his vacation pay for that year as of January 1. The other half of the leave entitlement will be nonvested at that time.

Although the General Plan enables a covered employee to take his entire leave entitlement anytime after January 1, if an employee leaves his job prior to reaching his anniversary date, he must reimburse petitioner for any used portion of the nonvested leave entitlement. Moreover, if a covered employee retires or voluntarily terminates employment with unused leave entitlement, petitioner will only pay the employee for the

vested leave entitlement. The employee does not have a right to receive payment for any unused nonvested leave entitlement.

An employee receives vacation pay under the General Plan equal to the salary he would normally receive when the vacation is actually taken. Vacation pay is not based on the employee's salary at the beginning of the calendar year.

2. The Star Markets Plan

Star Markets provides vacation pay benefits to certain non-union employees under a plan which differs from the General Plan. Star Markets permits an employee to take 1 week of vacation after 1 year of continuous service, and 2 weeks of vacation after 2 years of continuous service. The plan also permits employees with 5 years or more of continuous service to take additional vacation pay benefits. The actual amount of vacation for which an employee qualifies hinges on the employee's anniversary date with Star Markets. The following shows the vacation schedule for employees who qualify for 1 week of vacation under the Star Markets Plan:

If Anniversary Date falls between:	Vacation may be taken between:
January 1 & April 30	May 1 & October 31
May 1 & December 31	Upon reaching Anniversary

The Star Markets Plan permits an employee on the payroll as of April 30 to take 2 weeks of vacation after completing 2 years of continuous service with Star Markets. The following shows the vacation schedule for employees who qualify for 2 weeks of vacation under the Star Markets Plan:

If Anniversary Date falls between:	Vacation may be taken between:
January 1 & April 30	May 1 & October 31
May 1 & December 31	First Week: Between May 1 & October 31 Second Week: Upon reaching Anniversary

The parties have stipulated that, by the end of TYE 8701 and TYE 8801, employees satisfied three-quarters of the service necessary under the Star Markets Plan to qualify for 1 or 2 weeks of vacation, regardless of their respective anniversary dates. That is to say, the parties have stipulated that all employees were on the payroll as of April 30. The three-quarters of the service satisfied (the 9-month span from May 1 to January 30 or 31) corresponds to an employee's "accumulated benefits" since, contrary to the General Plan, vacation benefits do not vest ratably under the Star Markets Plan. (Nonaccumulated benefits consist of that one-quarter of the vacation entitlement measured from the end of the relevant tax year (January 30 or 31) to the applicable date of grant (April 30).)

For employees who qualify for 1 or 2 weeks of vacation pay, the Star Markets Plan vacation season extends from May 1 through December 31 of each year. Unless an

individual terminates employment prior to reaching his anniversary date, he becomes fully vested in the first and second weeks of vacation as of the date he is eligible to take his vacation under the plan (with the exception of an employee starting between May 1 and December 31, who can take his first week between May 1 and October 31, but does not vest until his anniversary date).

All vacation under the Star Markets Plan must commence within the calendar year in which an employee reaches his anniversary date with Star Markets. No vacation benefits may be accumulated from year to year. (The record does not disclose how an employee whose anniversary date falls in the last week of December is supposed to take his vacation. We presume that, as long as his vacation commences before the end of that calendar year, it may continue into the next calendar year without forfeiture.) As with the General Plan, the Star Markets Plan calculates vacation pay benefits using an employee's rate of pay in effect at the time the vacation is actually taken; vacation pay is not premised on an employee's salary at the beginning of the calendar year.

3. The Acme Markets Plans

Acme Markets offers vacation pay benefits to certain union employees. The Acme Markets Plans' vacation season extends from May 1 through September 30 of each year for the first and second weeks of vacation, and May 1 through April 30 of the next calendar year for the third, fourth, and fifth weeks of vacation. In contrast with the Star Markets Plan, employees covered by the Acme Markets Plans vest ratably in a specified amount of leave for

each month or each week they work for Acme Markets between May 1 of one calendar year and April 30 of the next year. The amount of leave in which an employee vests depends on the employee's length of continuous service with Acme Markets. As of May 1 of each year, an employee will be fully vested in the vacation pay he is expected to take during the vacation season beginning on that date.

All vacations under the Acme Markets Plans must be used during the relevant vacation season; no vacation benefits accrue from one vacation season to the next. A covered employee who terminates employment before reaching the May 1 start of a vacation season retains the right to receive payment for vacation pay benefits he has vested in since May 1 of the preceding year. However, he has no right to receive vacation pay for nonvested vacation benefits he would have vested in by the May 1 start of the next vacation season. An employee receives vacation pay under the Acme Markets plan equal to the salary he would normally receive when the vacation is actually taken.

B. Petitioner's Section 463 Deductions

For the General Plan and the Acme Markets Plans, petitioner included both the unused yearend vested and nonvested vacation benefits in calculating its vacation pay accruals under section 463 for the relevant period. In some instances, petitioner applied inflation factor adjustments to the unused yearend vested and nonvested vacation benefits when calculating claimed accruals under section 463. The parties agree that petitioner may include

the unused yearend vested vacation benefits and related adjustments when calculating its vacation pay accruals under section 463. Respondent disputes, however, petitioner's inclusion of the unused yearend nonvested vacation benefits and adjustments when calculating the vacation pay accruals under section 463 for TYE 8701 and TYE 8801.

Petitioner also included the yearend Star Markets accumulated and nonaccumulated benefits when calculating the claimed vacation pay accruals under section 463 for the relevant period. Star Markets also applied inflation factor adjustments to the yearend accumulated and nonaccumulated benefits when calculating the claimed vacation pay accruals under section 463. The parties agree that Star Markets may include the yearend accumulated benefits and corresponding adjustments when calculating its vacation pay accruals under section 463. However, respondent disputes the inclusion of the nonaccumulated benefits and adjustments when calculating accruals for TYE 8701 and TYE 8801.

Discussion

The issues we must decide are: (1) Whether petitioner properly deducted contributions made to Multiemployer Plans attributable to services performed after TYE 8801 on its return for that year; and (2) whether petitioner properly deducted certain nonvested or nonaccumulated vacation pay liabilities pursuant to section 463 on its returns for TYE 8701 and TYE 8801. For the following reasons, we hold that the timing of petitioner's deductions was improper with respect to both issues.

Issue 1. The Deductions for Grace Period Contributions to Multiemployer Plans

During the relevant period, petitioner's subsidiaries made monthly contributions to 39 CBA Plans on behalf of their unionized employees. For each CBA Plan, the amount of the monthly contribution was obtained by multiplying the units of service worked by employees covered under the respective CBA Plan by the contribution rate.

For each taxable year prior to TYE 8801, petitioner deducted 12 monthly contributions based on covered hours worked during such year. Then, as to TYE 8801, petitioner changed its method of calculating its deduction. For that year, petitioner obtained an extension to October 17, 1988, of the time within which to file its return. Between the date on which TYE 8801 ended and the extended due date of the return, petitioner's subsidiaries made 7 or in some cases 8 monthly contributions to the CBA Plans, and claimed these grace period contributions as a deduction for TYE 8801, in addition to the 12 monthly contributions.

Section 404(a) specifies that employer contributions to exempt trusts under various types of qualified employee benefit plans are not deductible under any other Code provision, but if they would otherwise be deductible, they are deductible under section 404, subject to articulated limitations as to the amount deductible in any taxable year. The limitations on the amount deductible are contained in section 404(a)(1)(A), which also refers to the deduction of contributions "In the taxable year when paid". However, section 404(a)(1)(A) does not

specify the method by which the actual amount of the deduction may be determined.

The applicable limitations on contributions to CBA Plans in this case are contained in clauses (i) and (iii) of section 404(a)(1)(A), which together provide that the overall limitation is the greater of the amount necessary to satisfy the minimum funding standard of section 412(a) for plan years ending within the employer's taxable year, and an amount equal to the normal cost of the plan, augmented by any amount necessary to amortize unfunded costs equally over 10 years. In addition, the flush language at the end of subparagraph (A) of the foregoing section provides, among other things, that the maximum amount deductible for the taxable year is to equal the full funding limitation for such year determined under section 412.

As a further refinement of the section 404(a) limitations on the deductibility of contributions, section 413 provides certain rules that apply exclusively to "Collectively bargained plans, etc." Section 413(a) provides that subsection (b) applies to any plan (and any trust thereunder) maintained pursuant to a CBA; i.e., a CBA Plan. Various paragraphs of subsection (b) provide rules that relate to CBA Plans, but the relevant paragraph for the instant matter is paragraph (7), which furnishes a blueprint for applying section 404(a) limitations insofar as they relate to CBA Plans. Section 413(b)(7) states:

> Deduction Limitations. – Each applicable limitation provided by section 404(a) shall be determined as if all participants in the plan were employed by a single employer. The amounts contributed to or under the plan by each

> employer who is a party to the agreement, for the portion of his taxable year which is included within such a plan year, shall be considered not to exceed such a limitation if the anticipated employer contributions for such plan year (determined in a manner consistent with the manner in which actual employer contributions for such plan year are determined) do not exceed such limitation. If such anticipated contributions exceed such a limitation, the portion of each such employer's contributions which is not deductible under section 404 shall be determined in accordance with regulations prescribed by the Secretary.

Petitioner concedes in its brief that the facts and the issue before us are "essentially identical" to that of a case before the Court at the time the briefs were filed, which we have since decided in favor of the Commissioner. See *Lucky Stores, Inc., & Subs. v. Commissioner*, 107 T.C. 1 (1996) (Lucky Stores I). Many of the arguments petitioner poses in the instant case were discussed at length in Lucky Stores I, or in the Supplemental Memorandum Opinion, *Lucky Stores, Inc., & Subs. v. Commissioner*, T.C. Memo. 1997-70 (Lucky Stores II), and we need not retread the same ground here. However, we shall address certain of petitioner's arguments pertaining to the deduction limitations of section 404(a)(1)(A) and section 413(b)(7), and their relation to section 404(a)(6).

For the reasons detailed below, we conclude that petitioner, by its misguided attempt to use the expanded time of payment provision of section 404(a)(6) to augment its current contribution deduction, has run afoul of the deduction limits for individual employer contributors

imposed by sections 404(a)(1)(A) and 413(b)(7). See *Lucky Stores, Inc., & Subs. v. Commissioner*, 107 T.C. at 12.

Sections 404(a)(1)(A) and 413(b)(7) place limits on the *overall* amount that may be deducted by *all* contributing employers to a CBA Plan for portions of their respective tax years included in a plan year. They do not detail the method by which the actual amount of the deduction of an *individual* employer contributor may be calculated. Nevertheless, in the absence of regulations promulgated by the Secretary, we think these sections outline the approach that should be taken to determine the permissible amount of each employer's deductions for contributions to a CBA Plan. The dominant themes we extrapolate from section 413(b)(7) to aid us in this regard are those of consistency and predictability.

Section 413(b)(7) provides a necessary fiction for employer contributors to ascertain whether they will exceed the overall deduction limitation of section 404(a)(1)(A) for a given plan year since: (1) They cannot know the exact amount of their required contributions for a plan year until the units of service are actually completed by their employees; (2) their tax years do not necessarily correspond with one another; and (3) employer contributors are not required to report to plan administrators the deductions they claim for contributions. Section 413(b)(7) states that all employers' contributions for a plan year will not exceed the overall limit imposed by section 404(a)(1)(A) if the total anticipated contributions for the plan year do not exceed such limit. Anticipated contributions for a plan year *must* be determined in a manner consistent with that in which actual

contributions are determined. Sec. 413(b)(7). Actual contributions are calculated by plan administrators based on units of service worked within the 12-month plan year.

Petitioner presumes that, once the total anticipated contributions are found not to exceed the overall deductible limit, it can thereafter elect to augment the amount of its actual contributions for its tax year pursuant to section 404(a)(6) to take advantage of any leftover overall limitation for the corresponding plan year (the difference between full funding under section 412 and all anticipated employer contributions for that plan year). Any other approach, petitioner contends, in effect recalculates anticipated contributions, which defeats Congress' intent in using the word "anticipated". Petitioner is mistaken on 2 counts. First, except to the limited extent discussed below, none of petitioner's contributions qualify for section 404(a)(6) treatment. Second, petitioner fails to comply with the individual deduction limits of section 404(a)(1)(A) and section 413(b)(7).

Section 404(a)(6) states:

> Time When Contributions Deemed Made. – For purposes of paragraphs (1), (2), and (3), a taxpayer *shall* be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof). [Emphasis added.]

If a taxpayer fulfills the above conditions, section 404(a)(6) *automatically* applies; no election is required or

contemplated under the statute. The operative language is "shall".

In arguing that it has complied with the foregoing conditions, petitioner relies heavily on Rev. Rul. 76-28, 1976-1 C.B. 106, which offers guidelines to interpret the meaning of the phrase "on account of". In pertinent part, the ruling states:

> a payment made after the close of an employer's taxable year to which amended section 404(a)(6) applies shall be considered to be on account of the preceding taxable year if (a) the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer, and (b) either of the following conditions is satisfied.
>
> (1) The *employer designates* the payment in writing to the plan administrator or trustee as a payment on account of the employer's preceding taxable year, or
>
> (2) The *employer claims* such payment as a deduction on his tax return for such preceding taxable year * * * .[Rev. Rul. 76-28, 1976-1 C.B. at 107; emphasis added.]

The underscored language above illustrates that Rev. Rul. 76-28 offers those employers to which it applies the opportunity for what is in effect an election under section 404(a)(6). In Lucky Stores I, we did not need to address the weight to be afforded Rev. Rul. 76-28 in the context of CBA Plans. *Lucky Stores, Inc., & Subs. v. Commissioner*, 107 T.C. at 13-14. We held that, in any event, grace period contributions based on services performed after the close of the taxable year were not "on account of" the earlier

tax year in that the taxpayer had not proven that the "same treatment requirement" of Rev. Rul. 76-28 was satisfied. *Id.* (The only grace period contributions that we find to be "on account of" TYE 8801 and which, consequently, *must* be deducted in that year, are any delinquent payments and the payments for services performed in the last month of TYE 8801 but not paid until the first month of TYE 8901.)

We think that an individual employer's contributions and ensuing deductions for its tax year, in order to comport with anticipated contributions for the plan year on which the section 413(b)(7) deduction limit is based, must be limited to those contributions attributable to services performed over a 12-month period. *Lucky Stores, Inc., & Subs. v. Commissioner*, 107 T.C. at 14. Section 413(b)(7) states that each limit under section 404(a) shall be determined as if all plan participants were employed "by a single employer", which mandates uniformity of tax treatment for employer contributors even as their tax years are widely disparate. As a result, petitioner may not unilaterally and arbitrarily expand its deduction limitation, and thereby increase the amount of its deduction for its tax year, by including contributions in its tax year in a manner at odds with how anticipated contributions previously had been determined for the plan year in which its tax year falls. *Id.* (In response to one of petitioner's arguments, we recognize that, in certain limited situations, where the same plan year includes both the last day of an employer's tax year and the entire 8½ month grace period that follows the tax year, the use of section 404(a)(6) in the manner advocated by petitioner, if permitted, would have no effect on an individual employer's

anticipated contributions for the plan year. However, many employer contributors would not fall under this category due to their widely varying tax years. Since these employer contributors could not also use section 404(a)(6) without impermissibly distorting their anticipated contributions, the requirement of uniform tax treatment would be violated if the individual employer whose anticipated contributions would be unaffected were able so to use section 404(a)(6). Sec. 413(b)(7).)

Under the 12-month limitation discussed above, anticipated contributions are easily forecast at the outset of a plan year; no recalculation is ever required. In order to arrive at anticipated employer contributions, each employer can examine prior years' Forms 5500 which indicate actual contributions to a plan for units of work performed during a plan year. Alternatively, an employer can ask the plan administrator to indicate the amount of contributions it expects to be due for units of service performed under the plan during the year.

Petitioner acknowledges that section 413(b)(7) establishes a means "whereby the party with the most information (i.e., the multiemployer plan) can determine in advance whether employer contributions will exceed the deductible limit." Yet, under petitioner's theory, a plan administrator could make no such determination. If an employer contributor could arbitrarily expand its actual contributions for its tax year by "electing" to do so under section 404(a)(6), anticipated contributions for the corresponding plan year would become indeterminate and, therefore, unreliable. They would no longer approximate the amount of actual contributions for a plan year. This, in turn, would cause the section 413(b)(7) fiction to

become unworkable, leading to the inability of a plan to prospectively determine whether the overall limit would be exceeded.

Petitioner attempts to finesse this point by positing that, whereas section 404(a)(6) deems a contribution to be made in an earlier *tax* year, section 413(b)(7) measures employer contributions that are expected to be actually made to a Multiemployer Plan during its *plan* year. Under this reasoning, the treatment of contributions pursuant to section 404(a)(6) does not affect the limits under section 413(b)(7). Petitioner asserts that section 404(a)(6) "expressly limits this deemed treatment" of grace period contributions in the preceding tax year to section 404(a). Petitioner then concludes that the tax year in which a contribution is deducted is "wholly irrelevant" under section 413(b)(7).

We disagree with the preceding disjunctive analysis. Petitioner ignores that section 413(b)(7) is merely an amplifying refinement of section 404(a) in the context of CBA Plans. See *Lucky Stores, Inc., & Subs. v. Commissioner*, 107 T.C. at 11. Section 413(b)(7) even refers directly to section 404(a): "Each applicable limitation provided by section 404(a) shall be determined". As such, sections 404(a) and 413(b)(7) cannot be read separately. Together, they enable individual employer contributors to determine their deduction limits in the tenebrous context of overlapping tax and plan years. Consequently, section 404(a)(6), by its reference to section 404(a)(1) through (3), has an impact on section 413(b)(7).

Petitioner maintains that, if an individual employer's tax treatment of its contributions affects the deductibility

of all contributions, administrators and other contributing employers could never know whether a contribution was in fact deductible. That would no doubt be true under petitioner's approach, in which an employer's tax treatment is subject to its unilateral allocation of grace period contributions. However, such a problem never arises if an employer contributor premises its deduction on services performed in its 12-month tax year.

Petitioner argues that the rationale of *Airborne Freight Corp. v. United States*, 76 AFTR 2d 95-7497, 96-1 USTC par. 50,004 (W.D. Wash. 1995), should prevail in the instant case. However, as we noted in Lucky Stores II, the District Court did not directly confront the question of section 404(a) deduction limitations. *Lucky Stores, Inc., & Subs. v. Commissioner*, T.C. Memo. 1997-70. Rather, the court summarily opined that, because the taxpayer was late in filing its 1989 tax return, it could not have interfered with the ability of other employers to calculate and claim their deductions. *Airborne Freight Corp. v. United States*, 76 AFTR 2d 95-7497, at 95-7499, 96-1 USTC par. 50,004, at 83,015 (W.D. Wash. 1995). The District Court held that, since the "plan-wide deductible limit" had not been exceeded, the disputed deductions were permissible. *Id.* Such a conclusion can only be reached retrospectively, which is precisely what petitioner (correctly) opposes as contrary to Congress' intent. In addition, this holding does not recognize an employer contributor's individual deduction limit. We respectfully disagree with the District Court's analysis.

In our view, limiting each employer's deductions to contributions based on services performed in its 12-month tax year leads to the following salubrious results:

(1) Deductions are predictable since they do not hinge on section 404(a)(6); and (2) no employer can usurp a greater share of a plan year's overall deduction limit at another's expense based on the vagaries of when its tax year ends in relation to that of other employers or when it files its return. Cf. *Airborne Freight Corp. v. United States*, 76 AFTR 2d 95-7497, at 95-7499, 96-1 USTC par. 50,004, at 83,015 (W.D. Wash. 1995) ("It seems only fair to require that those employers who choose to file their tax returns later must accept the risk of possible limitations on their ability to claim deductions.").

Finally, sections 404(a) and 413(b)(7) offer employers a powerful incentive to participate in qualified plans. Employers obtain the significant tax advantage of a deduction for plan contributions in many cases years before the corresponding income is recognized by their employees. (In general, employee participants are not taxed until the time they receive distributions from a qualified plan, whereas an employer's contributions to a qualified plan are deductible when paid to the trust. In contrast, for nonqualified plans, an employer's contributions are not deductible when paid; they are deductible only when the employee participant reports the amount of the contribution as income. Sec. 404(a)(5).) However, sections 404(a) and 413(b)(7) impose restraints which cannot be disregarded. Petitioner baldly seeks to garner an additional tax benefit, permanent tax deferral, by its one-time bunching of up to 20½ months of deductions in TYE 8801 for each of the 39 Multiemployer Plans to which it contributed. See *Lucky Stores, Inc., & Subs. v. Commissioner*, T.C. Memo. 1997-70. We are not convinced that

Congress intended section 404(a)(6) to be read so expansively, or in a manner inconsistent with section 413(b)(7), in furtherance of such a dubious goal. We therefore hold that pension contributions, based on units of service worked after the close of TYE 8801 and before October 17, 1988, were not "on account of" TYE 8801, as required by section 404(a)(6), and are therefore not deductible in that year.

Issue 2. The Vacation Pay Deductions

We now turn to the issue of whether certain vacation benefits were "earned" pursuant to section 463 by the end of TYE 8701 and TYE 8801 such that petitioner could take deductions for vacation pay liabilities in those years. Section 463 was repealed by section 10201(a) of the Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203, 101 Stat. 1330-387, effective for taxable years beginning after December 31, 1987.

Prior to repeal, section 463 provided as follows:

> (a) Allowance Of Deduction. – At the election of a taxpayer whose taxable income is computed under an accrual method of accounting, if the conditions of section 162(a) are otherwise satisfied, the deduction allowable under section 162(a) with respect to vacation pay shall be an amount equal to the sum of –
>
> (1) a reasonable addition to an account representing the taxpayer's liability for vacation pay earned by employees before the close of the taxable year *and paid during the taxable year or within 8½ months following the close of the taxable year* * * *

* * *

> Such liability for vacation pay earned before the close of the taxable year shall include amounts which, because of contingencies, would not (but for this section) be deductible under section 162(a) as an accrued expense * * * [Emphasis added.]

The Tax Reform Act of 1986, Pub. L. 99-514, sec. 1165(a), 100 Stat. 2511, amended section 463(a)(1) for tax years beginning after December 31, 1986. Prior to the amendment, the section read "and expected to be paid during the taxable year or within 12 months following the close of the taxable year" in lieu of the underscored language above.

For our present purposes, it is helpful to review the history of vacation pay liability deductions antedating the enactment of section 463 by the Act to Amend the Tariff Schedules of the United States, Pub. L. 93-625, sec. 4(a), 88 Stat. 2108, 2109, for taxable years beginning after December 31, 1973. Prior to 1954, in 2 published rulings under the 1939 Code, I.T. 3956, 1949-1 C.B. 78 and G.C.M. 25261, 1947-2 C.B. 44 (no date given), the IRS ruled that liability for vacations with pay may, with respect to some employees, be terminated, if the employment relationship is severed prior to the scheduled vacation period. Nevertheless, it is stated that this contingency should not preclude "the accrual of vacation pay *at the end of the taxable year in which the services are performed*, since, with respect to the individual employee at the end of such year, the employer would be justified in anticipating that the liability will be paid". I.T. 3956, 1949-1 C.B. 78 (emphasis added).

Despite the existence of these taxpayer-friendly rulings, courts imposed a stricter standard for the accrual of vacation pay liabilities in instances where earned vacation pay entitlements were forfeitable due to post-year-end contingencies. E.g., *E.H. Sheldon & Co. v. Commissioner*, 19 T.C. 481 (1952), affd. in part and revd. in part 214 F.2d 655 (6th Cir. 1954); *Tennessee Consol. Coal Co. v. Commissioner*, 15 T.C. 424 (1950).

In light of these decisions, the IRS issued Rev. Rul. 54-608, 1954-2 C.B. 8, which revoked I.T. 3956 and modified G.C.M. 25261, 1947-2 C.B. 44. The ruling stated that employers must "clearly establish" the fact of liability to individual employees by the end of a tax year to accrue vacation pay in that year. Rev. Rul. 54-608, 1954-2 C.B. at 9-10. Consequently, if an employee had to remain employed beyond the end of the year and until the scheduled vacation period in order to fix the employer's liability, respondent did not consider the liability to be accruable.

To prevent hardship to taxpayers who had relied on I.T. 3956, Congress continually delayed the effective date of Rev. Rul. 54-608 while it studied the vacation pay issue. See *Denver & Rio Grande W. R.R. v. Commissioner*, 38 T.C. 557, 575-576 nn.8, 9 (1962). Congress subsequently enacted section 463 in direct response to the strict accrual doctrine set forth in the ruling. The Senate report for Pub. L. 93-625 states that the repeal of I.T. 3956 "creates hardships for taxpayers who have been accruing vacation pay under plans which do not meet the requirements of the strict accrual rules set forth in * * * [Rev. Rul. 54-608]." S. Rept. 93-1357 (1974), 1975-1 C.B. 517, 521-522. The Senate report further states that section 463 "has been

developed as a result of * * * [Congress' study of this problem] and insofar as accrued vacation pay is concerned the committee believes it represents the permanent legislation promised by the committees." *Id.* at 9, 1975-1 C.B. at 522.

Section 463 permitted taxpayers to elect to establish a reserve account for the accrual of vacation benefits. It authorized a yearend deduction for "earned" but unpaid vacation benefits which otherwise failed to satisfy the strict accrual test due to the existence of contingencies which could result in the forfeiture of leave entitlement. Sec. 463(a)(1). To qualify for deduction, the benefits also had to be payable to employees within 12 months after the end of the tax year (a period later reduced to 8½ months for tax years beginning after December 31, 1986). Sec. 463(a)(1).

Petitioner accrued and deducted all vacation benefits that it expected to pay within 12 months of the close of TYE 8701 and within 8½ months of the close of TYE 8801. The parties agree that petitioner is entitled to the deductions, but they part company on the proper timing. Respondent contends that the 1987 vacation pay should have been deducted in TYE 8801 and the 1988 vacation pay ought to have been deducted in TYE 8901.

Although the term "earned" is not expressly defined in the statute or the legislative history, the parties both maintain that vacation pay is earned if it pertains to services performed before the close of a taxable year. The gravamen of the dispute, therefore, lies in whether vacation benefits under the General Plan, the Star Markets Plan and the Acme Market Plans were in fact attributable

to services performed before the close of the taxable year for which the deductions were sought.

For reasons which follow, we hold that the vacation benefits were not earned before the end of each taxable year within the meaning of section 463. Consequently, the deductions must be taken in the subsequent taxable years.

A. Vacation Benefits Are Partially Based on Services Performed After the End of the Taxable Years

1. The General Plan

Petitioner argues that the only service requirement for receiving leave entitlement under the General Plan is employment for the 12 consecutive months preceding the grant date. Respondent, on the other hand, asserts that employees earned their respective vacation benefits only as services were rendered over the 12-month period between consecutive anniversaries of the employees' initial dates of employment.

It is true for the General Plan that the granting of leave entitlement is *conditioned* on the performance of services during the 12 consecutive months preceding the date of grant (January 1). Nevertheless, as petitioner concedes, despite the employee's eligibility to take vested and nonvested leave after January 1, "the amount of the Leave Entitlement is based on the next anniversary of the employee's date of hire." As such, the leave entitlement is partially *attributable to* services performed after the end of the tax year. Thus, while an employee may have had to

work the 12 months before January 1 to qualify for *any* vacation benefits, the *extent* of the benefits received upon satisfying that precondition hinged upon the years of service he was expected to complete on his next anniversary date. As evidence of this, vacation pay benefits are calculated using an employee's rate of pay at the time the vacation is actually taken, rather than the rate of pay at the end of the taxable year. Furthermore, petitioner's own vacation plan brochures used the term "earned" in the same manner as respondent does here.

2. The Star Markets Plan and Acme Markets Plans

That vacation pay benefits are partially based on services performed after the end of the relevant taxable year is even more apparent under the Star Markets Plan and Acme Markets Plans. Unlike the General Plan, the Star Markets Plan and Acme Markets Plans provide no advance leave in the form of leave entitlement to employees. Rather, employees are not permitted to take any leave until all of the plans' service requirements are fulfilled. This occurs, at the earliest, on May 1 (the grant date), which is 3 months after the close of petitioner's taxable year.

Moreover, as with the General Plan, vacation pay benefits under the Star Markets Plan and Acme Markets Plans are calculated using an employee's rate of pay at the time the vacation is actually taken, rather than the rate of pay at the end of the taxable year.

B. Respondent's Disallowance of Claimed Deductions Does Not Render Section 463 Meaningless

1. The General Plan

Respondent contests petitioner's inclusion of the General Plan unused yearend nonvested leave entitlements in its calculation of vacation pay accruals under section 463 for TYE 8701 and TYE 8801. Petitioner asserts that vacation pay is earned as of the end of a tax year even if employees must perform additional services after the end of that year to absolutely fix an employer's obligation to provide the vacation pay. Petitioner posits that the fact that an individual employee did not have a nonforfeitable right to such vacation pay at the close of the taxable year determines only whether the pay is accrued or vested, not whether it is earned. Petitioner submits that, when stripped of its trappings, respondent's position is simply that "earned" means accrued, which thereby renders section 463 meaningless.

Respondent, on the other hand, contends that nothing in section 463 signals that vacation pay is earned simply because the employer permits its employees to take vacations. Respondent acknowledges that, under the terms of the General Plan, whether vacation pay was earned happened to coincide with whether it had vested. Nevertheless, she states that, in making her determination, she was not swayed by inappropriate factors such as whether the vacation benefits were vested, nonvested, or contingent, or whether the vacation benefits were subject to conditions subsequent or precedent.

The Court is persuaded that respondent did not rely on a strict accrual doctrine in contravention of section 463 in disallowing certain deductions for TYE 8701 and TYE 8801 under the General Plan. Strict accrual would prohibit any deduction if a possibility existed that the vacation benefits could be forfeited after the end of the taxable year. See Rev. Rul. 54-608, 1954-2 C.B. 8. Such a possibility exists even for the taxable yearend "vested" benefits under the General Plan, because of what is commonly called a "use-or-lose" provision in the plan. This provision requires participants to use their allocated vacation benefits by the end of the calendar year. If a participant fails to use all of the allocated leave, he receives no compensation for the unused leave remaining at the calendar yearend, and it cannot be carried over to the next year. Indeed, it appears to us that the principal reason for allowing an employee to take all of his leave as of January 1 is to ensure that all employees were able to take all of their leave entitlement without creating scheduling conflicts and without forfeiture. The use-or-lose provision applies to all leave allocated to an employee and does not distinguish between taxable yearend "vested" and "nonvested" benefits.

Due to the use-or-lose provision, there is no assurance as of the close of the taxable year that all otherwise "vested" vacation benefits will be used by participants by the end of the calendar year. Nevertheless, while the mere possibility of forfeiture would have precluded a deduction under the strict accrual doctrine espoused in Rev. Rul. 54-608, *supra*, respondent did not limit petitioner's deductions to yearend fixed and nonforfeitable vacation benefits in the instant case. Rather, she allowed

deductions to the extent [illegible] were based on services performed in that taxable year.

2. The Star Markets Plan

Star Markets included both the yearend accumulated and nonaccumulated benefits in calculating its claimed vacation pay accruals under section 463 for TYE 8701 and TYE 8801. Respondent disputes petitioner's inclusion of the yearend nonaccumulated benefits in its calculation of accruals under section 463. Respondent claims she did not consider inappropriate factors such as whether the vacation benefits were vested, nonvested, contingent, or subject to conditions subsequent or precedent in making her adjustments.

We are convinced that respondent properly focused solely on whether the vacation pay was earned pursuant to section 463. Respondent allowed petitioner a deduction based on three-fourths of the unpaid yearend vacation benefits (May 1 through January 30 or 31), disallowing only the nonaccumulated benefits (January 30 or 31 to April 30), even though *none* of the benefits *vested* until May 1, and employees could not take any leave before their service requirements were met for the entire year.

3. The Acme Markets Plans

By the end of TYE 8701 and TYE 8801, employees covered by the Acme Markets Plans would have vested in three-quarters of the vacation benefits they anticipated receiving in the subsequent taxable year. The remaining one-quarter of Acme Markets Plans vacation benefits

would fully vest by the May 1 following the end of those taxable years. Respondent disputes Acme Markets' inclusion of the nonvested benefits when calculating its vacation pay accruals under section 463.

Respondent correctly focused solely on the services performed by the end of the taxable year rather than the substantive rights of plan participants at the close of such year. To wit, respondent allowed petitioner a deduction based on three-fourths of the unpaid yearend vacation benefits despite the fact the plans did not permit employees to take leave before the service requirements were fully met, and no benefits were actually granted until 3 months after the close of petitioner's taxable year.

For each of the plans, although respondent did not acquiesce in petitioner's excessively broad interpretation of section 463, neither did she disregard statutory language and legislative history which sought to liberate accruals of vacation pay from the strictures of Rev. Rul. 54-608.

C. Petitioner's Attempt To Equate the Deductions At Issue with Deductions Allowed in I.T. 3956 Is Unavailing

We agree with petitioner that the legislative history discussed *supra* makes clear that section 463 was meant to apply to the type of vacation pay plan at issue in I.T. 3956, 1949-1 C.B. 78. However, we are not convinced by petitioner's comparison of the plans at issue in the instant case to the plan in I.T. 3956, *supra*, despite some shared characteristics.

In I.T. 3956, *supra*, a calendar year employer negotiated a vacation pay plan for its union employees pursuant to which eligible employees received a vacation entitlement on January 1 if they had worked 160 days in the preceding calendar year. The employer sought to deduct the vacation entitlement in the year in which the 160 days had been worked. The agreement further provided that vacations could be scheduled from January 1 to December 31, and that vacation pay was calculated using an employee's rate of pay at the time the vacation was actually taken. Moreover, no vacation with pay was due an employee whose employment relationship terminated prior to his scheduled vacation period.

I.T. 3956 concerned the accrual and deduction of vacation pay *where the service requirements had already been fulfilled* during the preceding calendar year, but where other provisions (such as termination of employment) could lead to the forfeiture of the earned leave. See *Latrobe Steel Co. v. Commissioner*, 62 T.C. 456, 465 (1974); *Oberman Manufacturing Co. v. Commissioner*, 47 T.C. 471, 477 (1967); *Denver & Rio Grande W. R.R. v. Commissioner*, 38 T.C. at 574. Although employees potentially had to remain employed well after the year of deduction to prevent a forfeiture of their vacation entitlements, those entitlements were based solely on the 160 days of service rendered in the preceding calendar year. The ruling did *not* address the issue of leave advances as provided by the General Plan.

Moreover, unlike I.T. 3956, for each of the plans at issue, the service requirements had only been partially fulfilled by the end of the respective taxable years. Consistent with I.T. 3956, respondent disallowed petitioner's

deductions only to the extent that the qualifying services had *not* been performed by the last day of TYE 8701 and TYE 8801. Consequently, we hold that vacation pay, based on units of service worked after the close of TYE 8701 and TYE 8801 and before the due dates of those returns as extended, was not earned in TYE 8701 and TYE 8801, as required by section 463(a)(1), and is therefore not deductible in those years.

To reflect the foregoing and issues previously resolved,

Decision will be entered under Rule 155.

UNITED STATES TAX COURT
Washington, D.C. 20217

AMERICAN STORES COMPANY AND SUBSIDIARIES,	)	
Petitioner,	)	Docket No. 19182-94
v.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

ORDER

Upon due consideration of petitioner's Motion Requesting Judicial Notice, filed May 30, 1997, it is

ORDERED that petitioners' above-referenced Motion Requesting Judicial Notice is denied. See Order issued this date denying petitioner's Motion for Reconsideration, filed May 30, 1997, and *Lucky Stores, Inc., and Subsidiaries v. Commissioner,* T.C. Memo. 1997-70.

(Signed) ARTHUR L. NIMS, III

Arthur L. Nims, III
Judge

Dated: Washington, D.C.
June 10, 1997

UNITED STATES TAX COURT
Washington, D.C. 20217

AMERICAN STORES COMPANY AND SUBSIDIARIES,	)	
Petitioner,	)	Docket No. 19182-94
v.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

ORDER

On May 30, 1997, petitioner filed a Motion for Reconsideration (Motion) of the Court's Opinion reported as *American Stores Company and Subsidiaries*, 108 T.C. ___ (March 31, 1997). The issue decided in that Opinion is identical with the issue decided in *Lucky Stores, Inc., and Subsidiaries*, 107 T.C. 1 (1996). In that case, petitioner filed a Motion for Reconsideration on essentially the same grounds as stated in petitioner's Motion in this case. The Motion for Reconsideration in *Lucky Stores, Inc., and Subsidiaries* was denied. See *Lucky Stores, Inc., and Subsidiaries v. Commissioner*, T.C. Memo. 1997-70 (February 10, 1997). For reasons stated therein, it is

ORDERED that petitioner's above-referenced Motion, filed May 30, 1997, is denied.

(Signed) ARTHUR L. NIMS, III
Arthur L. Nims, III
Judge

Dated: Washington, D.C.
June 10, 1997

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

AMERICAN STORES COMPANY AND SUBSIDIARIES,	)	
Petitioner - Appellant,	)	
v.	)	No. 97-9025
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent - Appellee.	)	

ORDER

Filed April 26, 1999

Before **ANDERSON, HOLLOWAY** and **BALDOCK,** Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by: /s/ _____
Deputy Clerk

Rev. Rul. 76-28[1]

This Revenue Ruling provides rules with respect to the application of section 404(a)(6) of the Code, as amended by the Employee Retirement Income Security Act of 1974 ("ERISA") (Pub. Law No. 93-406, 88 Stat. 829), 1974-3 C.B. 148, in those areas where the Service has determined that guidelines are necessary pending the issuance of regulations.

Section 404(a)(6) of the Code, as amended by ERISA, provides that for purposes of paragraphs (1), (2), and (3) of section 404(a), a taxpayer shall be deemed to have made payment of a contribution to a qualified retirement plan on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the income tax return for such taxable year (including extensions thereof).

Section 404(a)(6), as amended by ERISA, is applicable to contributions on account of taxable years of the employer which end with or within plan years which: (a) in the case of a plan which was not in existence on January 1, 1974, begin after September 2, 1974; (b) in the case of a plan which was in existence on January 1, 1974, and with respect to which the elections prescribed by sections 1017(d) and 1017(i) of ERISA have not been made, begin after December 31, 1975; (c) in the case of a plan with respect to which the election provided in section 1017(d) of ERISA (see § 11.410(a)-2(d) of the Temporary Income Tax Regulations under the Employee

---

[1] Also released as TIR-1431, dated Jan. 5, 1976.

Retirement Income Security Act of 1974) has been made, are subject to such election, or are subsequent thereto; or (d) in the case of a plan with respect to which the election provided in section 1017(i) of ERISA (as amended by section 402 of the Tax Reduction Act of 1975) [Pub. L. 94-12, 1975-1 C.B. 545] has been made, are subject to such election, or are subsequent thereto.

Whether a taxpayer is on the cash or accrual method of accounting, and whether or not the conditions for accrual otherwise generally required of accrual basis taxpayers have been met, a payment made after the close of an employer's taxable year to which amended section 404(a)(6) applies shall be considered to be on account of the preceding taxable year if (a) the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer, and (b) either of the following conditions is satisfied.

(1) The employer designates the payment in writing to the plan administrator or trustee as a payment on account of the employer's preceding taxable year, or

(2) The employer claims such payment as a deduction on his tax return for such preceding taxable year (or, in the case of a contribution by a partnership on behalf of a partner, the contribution is shown on schedule K of the partnership tax return for such year).

For purposes of the above requirements, the following rules shall apply.

First, a payment may be designated as a payment on account of the preceding taxable year in the manner

provided above at any time on or before the due date of the employer's tax return for such year (including extensions thereof).

Second, employers whose tax returns are due (including extensions thereof) on or before March 31, 1976, may, at any time on or before September 30, 1976, either designate such payment in the manner provided above or file an amended return claiming such payment in the manner provided above.

Third, once a payment has been designated or claimed on a return in the manner provided above as being on account of a preceding taxable year, the choice made shall be irrevocable and an employer may not retract or change such designation or claim.

The rules contained in this Revenue Ruling do not change the requirement that a plan must be in existence as of the last day of the employer's taxable year with respect to which a contribution is made. Furthermore, the rules contained in this Revenue Ruling implement the amendment made to section 404(a)(6) of the Code by ERISA, and, therefore, are inapplicable to taxable years of an employer not affected by that amendment.

No. 97-9025

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

AMERICAN STORES COMPANY AND SUBSIDIARIES
Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent-Appellee

ON APPEAL FROM THE JUDGMENT OF
THE UNITED STATES TAX COURT

REQUEST FOR JUDICIAL NOTICE

PAUL J. SAX
RICHARD E.V. HARRIS
RICHARD A. GILBERT
ORRICK, HERRINGTON
& SUTCLIFFE LLP
Old Federal Reserve Bank Building
400 Sansome Street
San Francisco, CA 94111-3143
Telephone: (415) 392-1122

Attorneys for Petitioner-Appellant
American Stores Company
and Subsidiaries

* * *

Declaration Of Richard E.V. Harris
In Support Of Requests For Judicial Notice

I, Richard E.V. Harris, do hereby declare that:

1. I am a partner with the firm of Orrick, Herrington & Sutcliffe LLP, 400 Sansome Street, San Francisco, California, and a member of the bar of this court.

2. This declaration is filed in support of the judicial notice requests of American Stores Company and Subsidiaries ("American Stores") in this appellate proceeding.

3. This declaration is based upon my personal knowledge.

4. The current and historical IRS materials attached to this declaration document, *inter alia*, the IRS's application of section 404(a)(6) and Revenue Ruling 76-28 to multiemployer defined benefit pension plans, including their application to some of the very same defined benefit plans involved in *American Stores*. The form and length of this foundational declaration has been made necessary by, *inter alia*, the Tax Court's failure to comply with Rule 201 of the Federal Rules of Evidence and the Internal Revenue Services' conduct attempting to misrepresent or conceal from the courts its actual administrative practice regarding the application of section 404(a)(6) and Revenue Ruling 76-28 to multiemployer defined benefit plans. In addition to making inaccurate representations to the Tax Court, the government's attempts have included efforts to prevent the taking of judicial notice of facts known by the IRS to be true, refusals to correct prior inaccurate representations, and even refusals to acknowledge the accuracy and genuineness of documents in the

IRS's own files, including copies of documents made public by the IRS from its own files.

IRS Letter Rulings ("LTRs") And Technical Advice Memoranda ("TAMs")

5. Attached as Exhibit "A" is a true and accurate copy of TAM 8210014, as released in redacted form and appearing in IRS Letter Rulings Reports.

6. Attached as Exhibit "B" is a true and accurate copy of TAM 8303002, as released in redacted form and appearing in IRS Letter Rulings Reports.

7. Attached as Exhibit "C" is a true and accurate copy of TAM 8714008 (dated December 17, 1986), as released in redacted form and appearing in IRS Letter Rulings Reports.

8. The redacted forms appearing in IRS Letter Rulings Reports do not contain the express names of the pension plans. As confirmed by other exhibits hereto, TAMs 8210014, 8303002 and 8714008 each involved one or more of the *very same* multiemployer defined benefit pension plans involved in *American Stores.*

9. Attached as Exhibit "D" is a true and accurate copy of TAM 8543002 (dated April 30, 1985), as released in redacted form and appearing in IRS Letter Rulings Reports.

10. Attached as Exhibit "E" is a true and accurate copy of LTR 7945115 (dated August 8, 1979), as released in redacted form and appearing in IRS Letter Rulings Reports.

11. Attached as Exhibit "F" is a true and accurate copy of LTR 8010123 (dated December 17, 1979), as released in redacted form and appearing in IRS Letter Rulings Reports.

IRS Manuals

12. Attached as Exhibit "G" is a true and accurate copy of an excerpt from the Internal Revenue Manual at Section 619.5 in Part VII of the Examination Guidelines Handbook as published in a current CCH edition of the Manual at IRM, 7(10)54, Chapter 600 ("Special Problems"), 619 ("Collectively Bargained Plans"), 619.5 ("Deductions"). Exhibit "G" notes that the text of Section 619.5 has been in the Internal Revenue Manual since February 1981.

13. Attached as Exhibit "H" is a true and accurate copy of an excerpt from the Internal Revenue Manual at Part VII of the *Examination* Guidelines Handbook as published in a current CCH edition of the Manual at IRM, 7(10)54, Chapter 300 ("Detailed Techniques – Defined Benefits Plans"), 320 ("Contribution Deduction"), 323 ("Timely Payments"). Exhibit "H" notes that the text of Section 323 has been in the IRM since February 1981.

14. Attached as Exhibit "I" is a true and accurate copy of an excerpt from the Internal Revenue Manual at Part VII of the Examination Guidelines Handbook as published in a current CCH edition of the Manual at IRM, 7(10)54, Chapter 400 ("Detailed Techniques – Defined Contribution Plans"), 413 ("Timely Payments of Contributions"), 413.1 ("Cash and Accrual Basis Taxpayers").

Exhibit "I" notes that the text of Section 413.1 has been in the Internal Revenue Manual since February 1981.

Documents Re: IRS National Office Technical Advice Proceedings

15. Exhibits "J" through "W" that follow are documents related to certain IRS National Office Technical Advice proceedings that involved one or more of the very same multiemployer defined benefit plans involved in *American Stores.*

16. Judicial notice is being requested to help ensure the Court's proper interpretation and understanding of the published IRS materials. Judicial notice is also being requested to help this Court fairly evaluate the IRS's characterization in the Tax Court of its own practice and rulings, particularly its assertion that certain IRS rulings did not involve multiemployer plans.

17. Judicial notice is being requested to document that (when the IRS issued its rulings) the IRS National Office was aware that the practice was prevalent and that "the same treatment could apply to any industry that has a similar plan." This awareness has also been independently documented by microfilm records obtained directly from the IRS. Judicial notice is also being requested to help this Court fairly evaluate the IRS's earlier assertions to the Tax Court in *Lucky Stores* that what Lucky Stores did was, in fact, new. *(Lucky Stores,* cited by the Tax Court in *American Stores,* was decided shortly before *American Stores;* the same Tax Court judge decided both cases.)

Technical Advice Memorandum 8210014

18. I am informed that the firm of Roberts & Holland, Washington, D.C., represented Yellow Freight in a TAM proceeding and that the TAM issued to Yellow Freight in November 1981 was subsequently published in redacted form as TAM 8210014.

19. I have personally spoken with a representative of the law firm, and I have been given access to certain documents from the TAM proceeding that led to TAM 8210014. (The access was authorized by the taxpayer.) In addition to being informed of the relationship by a representative of the firm, I was able personally to compare a copy of the TAM issued to the taxpayer with redacted TAM 8210014 to confirm the relationship. I was able to confirm that TAM 8210014 did involve two of the very same multiemployer defined benefit plans involved in *American Stores*.

20. The exhibits attached hereto as Exhibits "J", "K", and "L" are true and accurate copies of documents that I received from the law firm of Roberts & Holland LLP, Washington, D.C.

21. In response to my request for a copy of the unredacted TAM issued to Yellow Freight, I was provided the document attached hereto as Exhibit "J".

22. In response to my request for a copy of the related statement of facts, I was provided the document attached hereto as Exhibit "L" and the taxpayer's supplemental statement attached hereto as Exhibit "K". (Exhibits "R" and "S" hereto *from the microfilmed records of*

the IRS are copies of IRS documents equivalent to Exhibits "K" and "L" from the taxpayer.)

23. I am informed that said Exhibits "J", "K", and "L" attached hereto are true and accurate copies of documents from said firm's files and that the files were retrieved from a location leased by and under the control of said firm.

24. Based on my own inspection of the attached documents, a comparison of the attached documents with TAM 8210014, and the information and representations that I have received from said firm *(as well as my personal inspection of microfilmed copies from the IRS of equivalents of Exhibits "J" and "K")*, I believe that the attached documents are true and accurate copies of documents from the TAM proceeding that resulted in TAM 8210014.

Technical Advice Memorandum 8303002

25. I am informed that Centra, Inc. was the taxpayer in the TAM proceeding that led to the IRS's release of TAM 8303002. 1 have personally spoken with the current chief financial officer for Centra, and I have been given access by that taxpayer to certain documents from the TAM proceeding that led to 8303002. In addition to being informed by the chief financial officer of the relationship, I was able personally to compare a copy of the TAM issued to the taxpayer with the redacted TAM 8303002 to confirm the relationship. I was able to confirm that TAM 8303002 did involve one of the same multiemployer defined benefit plans involved in *American Stores*.

26. I have also reviewed a copy of "Request for Technical Advice from Assistant Commissioner (Technical)" which expressly references section 404, as well as the agent's discussion of the 404(a)(6) issue, which was apparently submitted with the Request.

27. The exhibits attached hereto as Exhibits "M", "N", and "0" are true and accurate copies of documents that I received from the taxpayer Centra, Inc. I am informed that said Exhibits attached hereto are true and accurate copies of documents from said company's files.

Technical Advice Memorandum 8714008

28. I am informed that Copps Corporation ("Copps") was involved in a TAM proceeding and that the TAM issued to Copps in December 1986 was subsequently published in redacted form as TAM 8714008.

29. I have personally spoken with the chief financial officer of Copps, the taxpayer in that TAM proceeding. He confirmed that Copps sought and obtained a TAM for its deductions for throwback contributions to the Central States Southeast and Southwest Areas Pension Fund ("Central States"), one of the very same multiemployer defined benefit plans involved in *American Stores*. I have also personally spoken with representatives of the accounting firm (Arthur Andersen) that represented Copps in the TAM proceeding.

30. In response to my requests, I was informed that the accounting firm had searched for but was unable to locate its file for the TAM proceeding because the file had already been destroyed. In response to my requests, I was

subsequently informed that Copps had searched for and had located its files related to the TAM proceeding.

31. I provided Copps and its accounting firm with copies of the TAM 8714008 documents that I already had and requested, among other things, clearer, more legible copies of those documents. After seeking advice, Copps declined to provide me voluntarily with more legible copies of the TAM 8714008 documents that I already had. Although Copps declined, nothing Copps or anyone else said suggested in any way that the copies I had provided Copps were anything other than completely genuine. The apparent reason for declining was a fear of retaliation by the IRS.

32. Based on contents of the published TAM 8714008 (Exhibit "C") and the contents of the attached Exhibit "P", and my personal inspection and my discussions with representatives of Copps and its accounting firm (*as well as my personal inspection of copies of microfilmed records from the IRS of the equivalent of all but the first page of Exhibit "P"*), I believe that the documents attached as Exhibit "P" are copies of documents in the IRS's files, specifically copies of documents related to TAM 8714008 and the proceeding which led to the IRS's issuance of that TAM. From this investigation, including the subsequent comparison with Exhibits "S" and "T" obtained from the IRS, I was able to confirm that TAM 8714008 did involve one of the very same multiemployer defined benefit plans involved in *American Stores*.

33. Attached as Exhibit "P" are true and accurate copies of the following documents:

a. The first page of an IRS "Notice Of Intention To Disclose" dated April 28, 1988 "Re: Copps Corporation" showing "12-17-86" as the date on which a written determination was issued regarding Copps Corporation. TAM 8714008, Exhibit "C," is dated December 17, 1986.)

b. A cover letter regarding a Request for Technical Advice dated in July and showing a July 1986 receipt by the Appeals Office.

c. A seven-page memorandum dated in June entitled "Request For Technical Advice Concerning Deductions For Contributions to Union Pension Plan," with subsections including

(1) "Taxpayer's Statement of Facts" expressly identifying the Central States Southeast and Southwest Areas Pension Fund, a multiemployer defined benefit plan,

(2) "Issue For Which National Office Advice Is Sought" expressly identifying the FYE as January 29, 1982 (the same FYE date in TAM 8714008 in IRS Letter Ruling Reports),

(3) "Internal Revenue Service Positions As Understood By Taxpayer" expressly identifying TAM 8210014 and Revenue Ruling 76-28, and

(4) "Taxpayer's Statement of Position."

(Exhibits "S" and "T" hereto are copies of documents equivalent to and comprising all of Exhibit "P" but for the first page; these documents were obtained *from the microfilmed records of the IRS.)*

Internal Revenue Service's Microfilm Records Of The Historical Materials Submitted By American Stores To The Tax Court In Connection With Its Request For Judicial Notice

34. Regarding certain judicial notice materials that American Stores submitted to the Tax Court, additional or equivalent copies have also been obtained independently from the Internal Revenue Service through administrative processes. These microfilmed records further corroborate the genuineness and accuracy of the information that American Stores submitted with its Rule 201(d) request for judicial notice. As previously noted, American Stores expressly requested the "opportunity to be heard" provided by the Federal Rules, but the Tax Court denied that judicial notice request without any hearing and without notice or advance warning.

35. Attached hereto as Exhibits "Q" and "R" are copies of microfilmed documents independently obtained from the Internal Revenue Service in response to inquiries about TAM 8210014.

a. Exhibit "Q" is an IRS microfilmed record of the document submitted to the Tax Court in connection with American Stores' Rule 201(d) request for judicial notice, Docket 35, Exhibit F (same document as Exhibit "K" hereto).

b. Exhibit "R" is an IRS microfilmed record of the document submitted to the Tax Court in connection with American Stores' Rule 201(d) request for judicial notice, Docket 35, Exhibit G (same document as Exhibit "L" hereto).

36. Attached hereto as Exhibits "S" and "T" are copies of microfilmed documents independently obtained from the Internal Revenue Service in response to inquiries about TAM 8714008.

a. Exhibit "S" is an IRS microfilmed record of the document submitted to the Tax Court in connection with American Stores' Rule 201(d) request for judicial notice, Docket 35, Exhibit N, page 2 (July 11, 1986 letter) (same document as Exhibit "P", page 2 hereto, at JNX 44).

b. Exhibit "T" is an IRS microfilmed record of the document submitted to the Tax Court in connection with American Stores' Rule 201(d) request for judicial notice, Docket 35, Exhibit N, pages 3-9 (June 27, 1986 memorandum) (same document as Exhibit "P", pages 3-9 hereto, at JNX 45-51).

Additional Internal Revenue Service Records (re LTR 7945115) Provide Further Corroboration

37. Attached hereto as Exhibit "U" is a copy of a microfilmed document independently obtained from the Internal Revenue Service in response to inquiries about LTR 7945115.

38. LTR 7945115 involved the application of IRC § 404(a)(6) and Revenue Ruling 76-28 to deductions of contributions to a defined benefit pension plan. (The taxpayer in TAM 8210014 expressly relied on LTR 7945115, which TAM involved the application of IRC § 404(a)(6) and Revenue Ruling 76-28 to deductions of contributions to multiemployer defined benefit pension

plans, including two of the very same plans involved in *American Stores.)*

39. Exhibit "U" obtained from the Internal Revenue Service's files is the letter of April 12, 1979 requesting the ruling:

a. The letter expressly requested a "ruling" "primarily **to clarify a statement in Revenue Ruling 76-28"** (emphasis supplied).

b. The taxpayer's plans are expressly identified as qualified "defined benefit plans."

c. The clarification sought involved the "treated by the plan in the same manner" requirement in Revenue Ruling 76-28 as applied to defined benefit plans.

d. The taxpayer's proposed transaction was the taking of throwback deductions on its 1978 return for contributions made in 1979:

"PROPOSED TRANSACTION

The corporation proposes to claim a deduction on its 1978 tax return for the contributions it makes in 1979 prior to filing its income tax return that do not exceed the maximum deductible contribution for 1978."

e. The taxpayer presented the issue as follows, noting the difference between defined benefit plans and defined contribution plans (emphasis supplied):

"DISCUSSION

Rev. Rul. 76-28 indicates that a payment to the plan is considered to be on account of the preceding year if the corporation claims a deduction for the payment on its tax

return and 'the payment is **treated by the plan in the same manner** that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer.'

The significance of the latter requirement is not clear in the case of a **defined benefit plan** such as the corporation's pension plans. In the case of a **defined contribution plan,** this requirement may mean that the contribution must be allocated to the accounts of plan participants in the same manner as contributions actually received by the plan during 1978. However, in the case of the corporation's defined benefit plans, no allocation of contributions to participants' accounts is necessary. Therefore, it appears that, in the case of a **defined benefit plan,** requirement (a) in **Rev. Rul. 76-28 does not have significance** and a payment made after the close of 1978 by the corporation could be **considered as 'on account of the preceding year'** by meeting either requirement (b)(1) or (b)(2).

RULING REQUESTED

In view of the foregoing, it is requested that a ruling be issued that the requirement of section 404(a)(6) that **'the payment is on account of' 1978** will be met **if the corporation claims** such payment as **a deduction on its return for 1978."**

40. A copy of the published ruling is attached as Exhibit "E" hereto. The ruling was submitted to the Tax Court as separate evidentiary support for American Stores' Rule 201(d) request for judicial notice (Docket 35,

Exhibit A) and was shown to have been expressly relied on by the taxpayer in connection with TAM 8210014 (Docket 35, Exhibit F, page 2), which applied Revenue Ruling 76-28 to multiemployer defined benefit plans. (TAM 8210014 was stipulated joint exhibit No. 57-BE in the Tax Court.)

Additional Internal Revenue Service Records (re TAM 8210014) Provide Further Corroboration

41. Attached hereto as Exhibit "V" is a copy of microfilmed documents independently obtained from the Internal Revenue Service in response to inquiries about TAM 8210014.

42. TAM 8210014 involved throwback deductions to multiemployer defined benefit plans. In the TAM proceeding, the taxpayer relied on, *inter alia*, Revenue Ruling 76-28, the contrasting natures of defined benefit plans and defined contribution plans, LTR 7945115 and the 1981 revisions to the Internal Revenue Manual, stating, in part:

> "The plan involved here is a defined benefit plan, as defined by ERISA. The [IRS'] National Office has made clear in a number of private letter ruling letters that, in the case of a defined benefit plan, the deduction will be allowed for contributions made after the last day of the preceding taxable year if claimed on the employer's tax return for that year. See LTR 7945115 (August 8, 1979). . . . [¶] The Service's position now has been reflected in the February 13, 1981 revision to *IRM* 7(10)54, 'Employee Plans Examination Guidelines Handbook,' Chapter 323(2),

> which concerns timely payments to a *defined benefit plan,*. . . . " (underlining in original).

43. I have personally inspected copies of the microfilmed records received from the Internal Revenue Service for TAM 8210014. The handwritten entry of October 26, 1981, in the technical case history [JNX 91] states:

> "10/26/81
>
> Spoke to IRA:
>
> He said, the 2ND req[uirement] in [Revenue Ruling] 76-28 (treated as if made on the last day of y[ea]r) – Applies ONLY to DC plans *[i.e.,* defined contribution plans] + it's OK to put that in the tech. adv. memo."
>
> (capitalization emphasis in original).

44. Although "Ira" is not expressly identified by surname, based on the context and information regarding the Internal Revenue Service (including the *Federal Yellow Book* for June 15, 1981, published by the *Washington Monitor*), I believe that the reference is to "Ira Cohen," Director, Actuarial Division, Office of the Assistant Commissioner, Employee Plans and Exempt Organizations.

45. The technical advice memorandum subsequently issued (TAM 8210014) is attached hereto as Exhibit "A" and as Exhibit "J". Its rationale contained the following explanation (bold emphasis supplied):

> "For a contribution to be considered to be on account of a preceding taxable year, Revenue Ruling 76-28 provides that two requirements must be met.

In the case in question, the employer has claimed the payments made from January 1, 1978, through September 15, 1978, **as a deduction on its tax return for 1977.** Thus, one of the requirements has been met.

In defined benefit plans, the requirement that the plan treat the payments in the same manner as payments actually received on the last day of the preceding taxable year, is usually meaningless. A contribution generally does not have any effect on the actual benefits payable to the employee. Thus, for the plans involved in this case, benefits were not affected by the treatment by the plan of the contributions made after the close of the year. Consequently, based on the foregoing, **the requirements of Revenue Ruling 76-28 have been met** and those amounts contributed from January 1, 1978, through September 15, 1978, may be **deemed to have been made** on the last day of the preceding taxable year (i.e., December 31, **1977**)."

Additional Internal Revenue Service Records (re TAM 8543002) Provide Further Corroboration

46. Attached hereto as Exhibit "W" is a copy of microfilmed documents independently obtained from the Internal Revenue Service in response to inquiries about TAM 8543002.

47. TAM 8543002 involved throwback deductions claimed on returns for amounts contributed "each month based on total monthly salary" to defined benefit plans. The throwback deductions claimed for the tax year ending in December were those amounts "contributed to the

plan during January through August of the succeeding calendar year." (A copy of TAM 8543002 is attached hereto as Exhibit "D".)

48. I have inspected copies of the microfilmed records received from the Internal Revenue Service for TAM 8543002. The handwritten entry of March 14, 1985 [JNX 92-93], in the technical case history contains the following regarding a discussion with "Jim Holland" (emphasis supplied):

> "Discussed w[ith] **Jim Holland** – it appears to me [taxpayer] is correct and that this case falls [square]ly within [Revenue Rulings] 76-28 and 77-82. The result seems strange so I checked w[ith] Jim. He says **this is common & is OK.**"

49. In the April 8, 1986, *Federal Yellow Book* published by the *Washington Monitor*, "James Holland" is listed as Chief, Pension Actuarial Branch, Employee Plans and Technical and Actuarial Division, Office of the Assistant Commissioner, Employee Plans and Exempt Organizations.

50. Currently, the *Tax Directory: Government Officials* published by Tax Analysts lists "James E. Holland" as Chief, Actuarial Branch 1, Employee Plans Division, Office of the Assistant Commissioner, Employee-Plans and Exempt Organizations.

51. Based on these and other records provided by the Internal Revenue Service and additional information about the IRS, I believe that the "Jim Holland" referenced in the TAM 8543002 technical case history is "James E. Holland."

52. As reflected in Exhibit "X", Mr. Holland also personally participated in the IRS's defense in the Tax Court in *Lucky Stores*, the case cited and relied upon by the Tax Court in *American Stores*.

Administrative Processes Seeking Internal Revenue Records Still Pending

53. Although American Stores has independently obtained access to certain Internal Revenue Service records through administrative processes (*e.g.*, Freedom of Information Act requests and appeals), IRS responses have been incomplete and those administrative proceedings are still pending.

IRS Technical Information Release (TIR-1431), January 5, 1976

54. The Internal Revenue Service issued Technical Information Release No. 1431 on January 5, 1976. TIR 1431 contained the full text of Revenue Ruling 76-28 and expressly stated:

> "The Internal Revenue Service today announced a Revenue Ruling that contains rules regarding the time that a contribution to a qualified retirement plan is deemed to be made.
>
> The Revenue Ruling, which follows, is effective immediately and will be published in Internal Revenue Bulletin No. 1976-4, dated January 26, 1976."

"A true and accurate copy of TIR-1431 from the Internal Revenue Service's Library is attached hereto as Exhibit "Y".

Examples of Government Misconduct in *Lucky Stores* That Infected The *American Stores* Case

55. The Tax Court in *American Stores* cited and relied on *Lucky Stores*, which had been decided shortly before *American Stores*. The same judge decided both cases, and he said in *American Stores* that "we need not retread the same ground here." *Lucky Stores* is currently on appeal to the Ninth Circuit.

56. Briefing on the pension issue in *Lucky Stores* was simultaneous. In its reply brief in *Lucky Stores*, the government represented and stated, inaccurately, that certain IRS rulings did not involve multiemployer defined benefit plans, when the rulings actually did involve multiemployer defined benefit plans. In fact, the rulings involved some of the same multiemployer defined benefit plans at issue in *Lucky Stores*.

LTR 8210014, No date given

Symbol: None given

NATIONAL OFFICE
TECHNICAL ADVICE MEMORANDUM

[Code Sec. 404]

Deductions for contributions of an employer to an employees' trust or an annuity plan and compensation under a deferred compensation plan; Deductible v. non-deductible; Year of deduction. – CCH.

ISSUE

Whether those amounts which were contributed to certain union negotiated plans by ***** and its subsidiaries during 1978, but prior to the date (with extensions) the 1977 tax return had to be filed, may be considered, in accordance with section 404(a)(6) of the Internal Revenue Code, to be "on account" of the 1977 year.

FACTS

Contributions are made by ***** and its subsidiaries to several union negotiated defined benefit pension plans. The employer's taxable year is the calendar year. For years prior to 1977, the employer contributed and deducted for each year, the contribution actually made to the plans between January 1 and December 31 of such year. (There may have been some minor year-end adjustments because of hours worked near the end of a year where some contributions were not remitted until after the close of such year.)

For the year ended December 31, 1977, the employer deducted, under section 404 of the Code, not only the contributions made during the 1977 calendar year, but also amounts that were contributed to the plans during the period January 1, 1978 through September 15, 1978. September 15, 1978, is the due date (including extensions) for filing the employer's tax return for 1977.

APPLICABLE LAW

Section 404(a)(6) of the Internal Revenue Code provides that a taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions).

Revenue Ruling 76-28, 1976-1 C.B. 107, provides that a payment made after the close of an employer's taxable year, as provided by section 404(a)(6), shall be considered to be on account of the preceding taxable year if (a) the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer and (b) either of the following conditions is satisfied:

(1) The employer designates the payment in writing to the plan administrator or trustee as a payment on account of the employer's preceding taxable year, or

(2) The employer claims such payment as a deduction on its tax return for such preceding taxable year.

RATIONALE

For a contribution to be considered to be on account of a preceding taxable year, Revenue Ruling 76-28 provides that two requirements must be met.

In the case in question, the employer has claimed the payments made from January 1, 1978 through September 15, 1978, as a deduction on its tax return for 1977. Thus, one of the requirements has been met.

In defined benefit plans, the requirement that the plan treat the payments in the same manner as payments actually received on the last day of the preceding taxable year, is usually meaningless. A contribution generally does not have any effect on the actual benefits payable to an employee. Thus, for the plans involved in this case, benefits were not affected by the treatment by the plan of the contributions made after the close of the year. Consequently, based on the foregoing, the requirements of Revenue Ruling 76-28 have been met and those amounts contributed from January 1, 1978, through September 15, 1978, may be deemed to have been made on the last day of the preceding taxable year (i.e., December 31, 1977).

This ruling does not consider the actual amounts deductible for the 1977 taxable year.

CONCLUSION

Those amounts contributed to certain union negotiated plans by ***** and its subsidiaries during 1978, but prior to the date (with extensions) the 1977 tax return had to be filed, may be considered to be on account of the 1977 tax year.

LTR 8714008, December 17, 1986

Symbol: Not given

NATIONAL OFFICE
TECHNICAL ADVICE MEMORANDUM

Uniform Issue List No.: 0404.11-00

[Code Sec. 404]

Deduction for contributions of an employer to an employee's trust or annuity plan and compensation under a deferred-payment plan; Deductible v. not deductible; Year of deduction; Paid after close of taxable year but before filing of return. – CCH.

ISSUE

Whether contributions paid after the close of the taxable year ending January 29, 1982, but before the filing of the applicable corporate tax return, are deductible on that return, when this taxable year is the first taxable year for which such deduction is claimed, and when such amounts are not attributable directly to unfunded past service liability incurred in that taxable year.

FACTS

****** (Employer) makes monthly contributions to the ***** (the Fund) on behalf of its covered employees. For the taxable year ending January 29, 1982, the Employer claimed a deduction for contributions paid after the close of that taxable year through approximately the extended tax return filing date of October 15, 1982. This was the first time the Employer claimed such a deduction for contributions paid after the close of the taxable year. In

the taxable year ending January 28, 1983, contributions paid from the filing date of the fiscal 1982 corporate tax return through the extended filing date of the fiscal 1983 return were taken as a deduction. Deductions for contributions in subsequent years have been claimed in the same filing-date to filing-date manner.

LAW

Under section 404(a)(6) of the Internal Revenue Code, a contribution made after the close of the taxable year, but prior to the time the appropriate return is filed, will be deemed to have been made on the last day of the preceding taxable year if it is made on account of that previous taxable year. Revenue Ruling 76-28, 1976-1 C.B. 107, states that a contribution is considered made on account of a taxable year if (a) the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer, and (b) either of the following is satisfied:

(1) the employer designates the payment in writing to the plan administrator or trustee as a payment on account of the employer's preceding taxable year, or

(2) the employer claims such payment as a deduction on his tax return for such preceding taxable year.

With respect to defined benefit plans, requirement (a) above is usually meaningless because a contribution to a defined benefit plan generally has no effect on the actual benefit payable to an employee.

Section 1.404-14(c) of the Income Tax Regulations provides alternative accounting methods for determining the limit on the deduction that a taxpayer may claim for a taxable year. A change from one method to another method constitutes a change in accounting methods for tax purposes. Section 404(a)(6) does not effect the accounting method used to calculate this limit. Instead, section 404(a)(6) provides a statutory time frame allowing a taxpayer to deduct certain amounts that are paid within that time frame and that fall within the limits determined under the accounting methods of section 1.404(c) of the regulations. Section 404(a)(6) of the Code, therefore, does not conflict with the accounting methods described in section 1.404-14(c) of the regulations for purposes of determining whether amounts paid after the close of the taxable year, but prior to the extended due date for filing this taxpayer's corporate tax return, are deductible on that return.

In general, section 404(a)(1)(A) of the Code limits the dollar amount of a taxpayer's deduction for contributions to a pension trust to the normal cost for the year plus an amount necessary to amortize certain credits in equal payments over 10 years. Nothing in the Code or the regulations requires contributions made after the close of the taxable year to be attributable to unfunded past service liability incurred in the previous taxable year in order to be deductible pursuant to section 404(a)(6). Instead, the limitation of section 404(a)(1)(A) is a fixed dollar amount that the taxpayer's deduction for the taxable year, including deductions pursuant to section 404(a)(6) for contributions made after the close of the taxable year, must not exceed. In addition, the principles

of Rev. Rul. 76-28, regarding the application of section 404(a)(6), are related only to the timing of contributions for deduction purposes and do not affect the computation of the plan's deductible limit under section 404(a). Therefore, such a deduction may be claimed without regard to whether such amounts are attributable to unfunded past service liability incurred in the previous taxable year.

RATIONALE

In this case, the Employer, for the first time, claimed a deduction for contributions made after the close of the taxable year, but prior to the date the return was filed. Section 404(a)(6) of the Code provides statutory authority for this deduction. Since the deduction was claimed on the corporate tax return for the applicable taxable year, the contributions are deemed made on account of that year pursuant to the requirements of Rev. Rul. 76-28. This deduction does not constitute a change in the Employer's accounting method in violation of section 1.404-14(c) of the regulations. Such amounts may be deducted without regard to whether they are attributable to unfunded past service liability incurred during the prior taxable year. The total amount that may be deducted, however, is limited by the dollar amount determined under section 404(a)(1)(A) of the Code.

CONCLUSION

Contributions paid by the Employer after the close of the taxable year ending January 29, 1982, but before the filing of the applicable corporate tax return for that year, are deductible on that return.

LTR 8303002, Date Not given

Symbol: Not given

NATIONAL OFFICE
TECHNICAL ADVICE MEMORANDUM

[Code Sec. 402]

Taxability of beneficiary of employees' trust; Time and manner of taxation; Payments after close of taxable year, but before return due date; Deductibility. – CCH.

ISSUE

Whether payments made to Plan X after the end of Company M's accounting year but before the due date, including extensions, for filing its Federal income tax return, are deductible for that prior year.

FACTS

Based on information provided by Company M, actuaries have determined the estimated portion of the unfunded past service liability, and the required contribution to amortize this estimated unfunded past service liability over a ten year period. Plan X contribution requirements were comprised of current service costs amounting to 30% of total contributions and of past service costs amounting to 70% of total contributions. These amounts have been based on a forty year funding period for the unfunded past service liability under the pension fund and an assumed valuation rate of interest of five percent per annum. Based on this information, the required contribution for the calender year 1977 is

$1,759,997, which is comprised of a $1,231,998 past service contribution and a $527,999 current service contribution. In addition, based on a forty year funding period for the unfunded past service liability and an assumed interest rate of five percent per annum, the unfunded past service liability was determined to be $21,620,179. If the estimated unfunded past service liability of $21,620,179 were to be amortized at the maximum allowable rate for a ten year period, the maximum allowable amount for past service would be $2,737,614. After adding current service costs of $527,999, the total maximum contribution allowable would be $3,265,613.

According to information submitted, Company M contributed $1,759,997 during the period 1/1/77 through 12/31/77 and $1,615,385 during the period 1/1/78 through 9/15/78. Company M files its returns on a calendar year but requested and received an extension for filing until 9/15/78 for 1977. Company M has also claimed deductions for prior year's payments on its 1978 and 1979 returns by use of the same reasoning.

APPLICABLE LAW AND RATIONALE

Section 404 of the Internal Revenue Code, which was modified by ERISA, imposes deduction limits. In order for a contribution to a pension plan, profit-sharing plan, or any other plan of deferred compensation to be deductible, the contribution must meet the ordinary and necessary expense requirements of Code sections 162 and 212. However, section 404 of the Code overrides sections 162 and 212. Accordingly, deductions to all deferred compensation plans, both qualified and nonqualified, may be

deducted, if at all, under section 404 of the Code. The deduction is limited to the lesser of the amount determined under sections 162 or 212, or under section 404, including the full funding limitation therein.

Section 404(a)(1)(A) of the Code allows a deduction for contributions paid into a pension trust, subject to certain limitations, in the taxable year when paid, and if such taxable year ends within or with a taxable year of the trust for which the trust is exempt under section 501(a).

Section 404(a)(1)(A)(iii) of the Code states that the deductible amount is an amount equal to the normal cost of the plan, as determined under regulations prescribed by the Secretary, plus, if past service or other supplementary pension or annuity credits are provided by the plan, an amount necessary to amortize such credits in equal annual payments (until fully amortized) over 10 years, as determined under regulations prescribed by the Secretary.

Section 404(a)(6) of the Code states the rules for determining the time when contributions are deemed to be made. A taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).

Revenue Ruling 76-28, 1976-1 C.B. 107, states that an employer's payment to a qualified retirement plan after the close of the employer's taxable year to which section

404(a)(6) of the Code, as amended, applies shall be considered to be on account of the preceding taxable year (providing the plan was in existence in such year) if the plan treats the payment as it would treat a payment actually received on the last day of the employer's preceding taxable year, and the employer designates the payment in writing to the plan administrator or trustee as a payment on account of its preceding taxable year or deducts the payment on its tax return on or before the due date of its return for such year, including extensions thereof. Employers whose returns are required to be filed on or before April 15, 1976, and who made a payment within the time prescribed by section 404(a)(6), may, at any time on or before September 30, 1976, either designate a payment or file an amended return claiming a payment in this manner and, once payment has been so designated or claimed on a return, the action shall be irrevocable.

Section 404(a)(1)(D) of the Code states that any amount paid in a taxable year in excess of the amount deductible in such year under the foregoing limitations shall be deductible in the succeeding taxable years in order of time to the extent of the difference between the amount paid and deductible in each such succeeding year and the maximum amount deductible for such year under the foregoing limitations.

Based on the foregoing law, a payment made after the close of the employer's taxable year to which section 404(a)(6) applies shall be considered to be on account of the preceding taxable year if (a) the payment is treated by the plan in the same manner that the plan would treat a

payment actually received on the last day of such preceding taxable year of the employer, and (b) either of the following conditions is satisfied:

(1) The employer designates the payment in writing to the plan administrator or trustee as a payment on account of the employer's preceding taxable year, or

(2) The employer claims such payment as a deduction on his tax return for such preceding taxable year.

Section 1.404(a)-14(c) of the Income Tax regulations sets forth the rules for determining the deductible limit under section 404(a)(1)(A) of the Code for defined benefit plans. This section provides that although the deductible limit applies for an employer's taxable year, the deductible limit is determined on the basis of a plan year. If the employer's taxable year coincides with the plan year, the deductible limit for the taxable year is the deductible limit for the plan year that coincides with that year. If the employer's taxable year does not coincide with the plan year, the deductible limit under section 404(a)(1)(A)-(i), (ii), or (iii) for a given taxable year of the employer is one of the following alternatives:

(1) The deductible limit determined for the plan year commencing within the taxable year,

(2) The deductible limit determined for the plan year ending within the taxable year, or

(3) A weighted average of alternatives (1) and (2). Such an average may be based, for example, upon the number of months of each plan year falling within the taxable year.

The employer must use the same alternative for each taxable year unless consent to change is obtained from the Commissioner under section 446(e).

CONCLUSION

In the instant case, taxpayer has claimed contributions made after the close of the taxable year but before the due date of the return, as deductions on the tax return for such preceding year. In addition, since there is no indication that there has been a change in the alternative as described in section 1.404(a)-14(c) of the regulations, the requirements of Code section 446(e), pertaining to requirements respecting change of accounting method, are not applicable. Therefore, based upon the information submitted, we have determined that the taxpayer's deduction for payments made to Plan X after the end of the taxpayer's accounting year but before the due date, including extensions, for filing its tax return for that year can include all plan contributions made during the period 1/1/77 through 9/15/78. In addition, we conclude that the deductions claimed on the 1978 and 1979 returns using the same reasoning are also allowable.

We express no opinion as to the correctness of the figures which were computed actuarially.

LTR 8207051, November 19, 1981

Symbol: E:EP:T:2

[Code Sec. 404]

Deductions for contributions of an employer to an employees trust or annuity lan [sic] and compensation under a deferred-payment plan; Deductible v. not deductible; Pension trust or annuity plans. – CCH.

You have requested a ruling that certain contributions by Corporation M to its pension plans, paid not later than the due date for Corporation M's Federal income tax return (including extensions thereof) will be deductible under section 404 of the Internal Revenue Code.

The following information has been submitted:

Corporation M maintains Plan X and Plan Y. Both are currently covered by favorable determination letters that they are qualified under section 401(a) and tax-exempt under-section 501(a) of the Code. Contributions under Plan Y are made to a number of bank trustees; contributions under Plan X are made to bank trustees as well as to insurance companies pursuant to a deposit administration contract. In accordance with the transition rule of section 1.412(c)(3)-1 of the Income Tax Regulations, the annual plan year contribution requirements for pension benefits under Plan Y and the trusteed portion of Plan X are actuarially determined as of the beginning of each plan year by indedpendent [sic] consultant actuaries under the "entry age normal – frozen initial liability" cost method. The insured portion of Plan X is funded under the "unit credit" cost method.

Currently, Corporation M's Finance Committee, acting on behalf of the Board of Directors, adopts a resolution recognizing the obligation to fund the plans in specific amounts not exceeding the amount estimated to be deductible under section 404(a)(1) of the Code. This resolution directs that payments on account of this obligation be made to the trusts not later than the due date for filing the Federal income tax return (including extensions thereof) for the year of the resolution. Other actions recognizing the obligation include communication to employees and notification of affected trustees. In addition, under Corporation M's previous practice, certain accounting entries were made on Corporation M's books to reflect the pension liabilities at year-end. Based on these facts, the National Office, in a prior letter ruled that, subject to the limitations of section 404(a)(1) of the Code, payments to Corporation M's pension trusts which were on account of pension liabilities would be deductible in Corporation M's Federal income tax return, providing the payments were made before the time prescribed for filing the return for that year (including extensions thereof).

It is now proposed that amounts paid to the pension trusts prior to the due date of Corporation M's Federal Income tax return for a year (including extensions thereof) be deducted in the year's return without undertaking the Corporate actions described above. Thus, since a base will not be established before year end under the revised approach, the above described accounting entries will no longer be made. The trusts will treat these payments as contributions with respect to the plan year

which began on the first day of the year for which the deduction is claimed.

Based on the foregoing you have requested a ruling that, subject to the limitations of section 404(a)(1), (a)(2), and (a)(7) of the Code, payments to pension trusts and insurance companies made on or before the due date of Corporation M's Federal income tax return for a year (including extensions thereof) will be deductible in that year's return.

Section 404(a)(1) of the Code provides, in general, that subject to certain limitations, contributions under a pension trust are deductible in the taxable year when paid, if the trust is exempt under section 501(a) for such taxable year.

Section 404(a)(2) of the Code provides, in general, that subject to certain limitations, contributions toward the purchase of retirement annuities are deductible in the taxable year when paid, if such purchase is under a plan which meets the applicable requirements of section 401(a) of the Code.

Under section 404(a)(6) of the Code, a taxpayer would be determined to have made a payment on the last day of the preceding taxable year, if the payment is on account of such taxable year and made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).

Rev. Rul. 76-28, 1976-1 C.B. 107, provides rules for the application of section 404(a)(6) of the Code. It states as follows:

"Whether a taxpayer is on the cash or accrual method of accounting, and whether or not the conditions for accrual otherwise generally required of accrual basis taxpayers have been met, a payment made after the close of an employer's taxable year to which amended section 404(a)(6) applies shall be considered to be on account of the preceding taxable year if (a) the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer, and (b) either of the following conditions is satisfied:

(1) The employer designates the payment in writing to the plan administrator or trustee as a payment on account of the employer's preceding taxable year, or

(2) The employer claims such payment as a deduction on his tax return for such preceding taxable year.

In the instant case, pension plan contributions during the filing period are treated as made in the same plan year as payments made on December 31. Moreover, since Plan X and Plan Y are defined benefit plans, the timing of the payments does not affect computation of benefits. Thus, the payment will be treated by Plans X and Y in the same way as if actually received on the last day of Corporation M's taxable year within the meaning of Rev. Rul. 76-28. Corporation M has indicated it will claim such payments as a deduction on its Federal income tax return for such preceding taxable year. Therefore, the requirements of Rev. Rul. 76-28 are met.

Accordingly, we conclude that subject to the limitations of sections 404(a)(1), (a)(2) and (a)(7) of the Code, payments to Plans X and Y, and insurance companies

made under the circumstances described above on or before the due date of Corporation M's Federal income tax return for the year (including extensions thereof) will be deductible on that year's return.

The above ruling is based on the assumption that Plan X and Plan Y will remain qualified plans under section 401(a) at the time the contributions are made.

LTR 8227068, April 9, 1982

Symbol: OP:E:EP:T:2

[Code Secs. 404 and 412]

Deduction for contributions of an employer to an employee's trust or annuity plan and compensation under a deferred payment plan; Deductible v. not deductible; Minimum funding standards; Funding standard account. – CCH.

This is in response to your recent letter in which you request a ruling that certain contributions made to Company M's two qualified defined benefit pension plans are deductible on Company M's federal income tax returns for the years in question.

You represent the facts as follows:

Company M maintains two defined benefit plans, Plan X and Plan Y, for its salaried and hourly employees, respectively. Company M's taxable year ends December 31. Plan X and Plan Y are qualified under section 401(a) of the Internal Revenue Code (Code) with their related trusts tax-exempt under section 501(a) of the Code. Favorable determination letters regarding Plan X and Plan Y were issued by the appropriate District Office on May 7, 1980, and on June 25, 1980, respectively. Most participants in Plan X are also participants in Plan Z which is Company M's qualified and tax-exempt stock bonus plan.

Company M usually has made monthly contributions to Plan X and Plan Y. It maintains funding standard accounts for both plans as required by Code section 412. It claims tax deductions for contributions to these plans as provided in section 404(a)(1) of the Code. During the

calendar year 1979, Company M made cash contributions to Plan X of $33,557,500 and to Plan Y of $33,604,000, a total of $67,161,500. Company M claimed a tax deduction of $67,161,500 in its 1979 income tax return for these contributions. The 1979 calendar year contributions to Plan X and Plan Y were recognized as the respective additions to the funding standard accounts for each plan for the taxable year 1979. For the calendar year 1980, Company M made contributions to Plan X of $36,736,500 and to Plan Y of $35,190,400, a total of $71,926,000. For the calendar year 1981, it is estimated that Company M will make contributions to Plan X of $41,500,000 and to Plan Y of $36,600,000. For the calendar year 1982, it is estimated that Company M will make contributions to Plan X of $46,000,000 and to Plan Y of $37,000,000.

For the years 1979 and 1980, respectively, expense was not accrued on Company M's financial books for contributions made to Plan X and Plan Y after the end of the calendar year. Company M has received an extension of time for filing its 1980 income tax return, to September 15, 1981. For the purpose of the ruling, it is assumed the due date for filing its 1981 income tax return will be September 15, 1982.

For the taxable year 1980, Company M proposes to claim a tax deduction for contributions to Plan X and Plan Y made: (a) during the calendar year 1980; and, (b) during the period in 1981 up to the date when the 1980 income tax return is filed pursuant to Code section 404(a)(6). The deduction, including amounts contributed after the end of the calendar year 1980, for Plan X will be $55,021,691, and for Plan Y will be $47,642,632, a total of

$102,664,323. The maximum limit on allowable deductions under section 404(a)(1)(A)(iii) of the Code is expected to apply. As a result, a portion, but not all, of the contributions made before the 1980 income tax return is filed will be claimed as tax deductions for the taxable year 1980.

For the taxable year 1981, Company M plans to claim a tax deduction for contributions to Plan X and Plan Y made: (a) during the calendar year 1981, not deducted in 1980; and, (b) during the period in 1982 up to the date when the 1981 income tax return is filed pursuant to Code section 404(a)(6): The deduction for Plan X is expected to be $53,814,809, and for Plan Y it is expected to be $48,847,768, a total of $102,662,577.

For purposes of the respective funding standard accounts for Plan X and Plan Y, credits will be recognized for contributions made during each of the calendar years 1980 and 1981, consistent with the prior year 1979. For the taxable year 1980, the credit to the funding standard account for Plan X will be $36,736,500, and, for Plan Y it will be $35,190,400, a total of $71,926,900. For the taxable year 1981, the credit to the funding standard account for Plan X is expected to be $41,500,000, and, for Plan Y it is expected to be $36,600,000, a total of $78,100,000.

For the taxable years 1980 and 1981, the tax deductions claimed for contributions made to Plan X and Plan Y will not exceed the maximum limitation prescribed in Code section 404(a)(1)(A)(iii).

For each of the taxable years 1980 and 1981, the total amount consisting of: (a) the tax deduction claimed for contributions to Plan X; and (b) the tax deduction claimed

for the company's share of contributions to Plan Z will not exceed 25 percent of participants' compensation paid by Company M as provided by section 404(a)(7) of the Code.

Under the proposed plan, no duplication of deductions or omission of taxable income will occur in the taxable years 1979 or 1980. No duplication of deduction or omission of taxable income is expected to occur in any future taxable years.

Specifically you request the following rulings:

(1) For its taxable year 1980, the contributions to Plan X and Plan Y made (a) during the calendar year 1980 and (b) during the period in 1981 up to the date when the 1980 income tax return is filed, are deductible for the taxable year 1980, pursuant to Code sections 404(a)(1) and 404(a)(6) and subject to the limitations of Code sections 404(a)(1)(A)(iii) and 404(a)(7).

(2) For its taxable year 1981, contributions to Plan X and Plan Y made (a) during the calendar year 1981 not deducted in 1980, and, (b) during the period in 1982 up to the date when the 1981 income tax return is filed, are deductible for the taxable year 1981, pursuant to Code sections 404(a)(1) and 404(a)(6) and subject to the limitations of Code sections 404(a)(1)(A)(iii) and 404(a)(7).

(3) The proposed deductions for 1980 and 1981 are not subject to any adjustment of taxable income under Code section 481.

(4) For the taxable years 1980 and 1981, Company M may recognize as credits to the funding standard account for Plan X and Plan Y those contributions made during

the calendar year, consistent with the prior year 1979, pursuant to section 412(b) of the Code.

Section 404(a) of the Code provides, in part, that if contributions are paid by an employer to or under a pension plan, such contributions shall not be deductible under section 162 (relating to trade or business expenses) or section 212 (relating to expenses for the production of income); but, if they satisfy the conditions of either of such sections, they shall be deductible under this section, subject, however, to the following limitations as to amounts deductible in any year: (1)(A) in the taxable year when paid, if the contributions are paid into a pension trust, and if such taxable year ends within or with a taxable year of the trust for which the trust is exempt under 501(a), in an amount determined as follow: (iii) an amount equal to the normal cost of the plan, as determined under regulations prescribed by the Secretary, plus, if past service or other supplementary pension or annuity credits are provided by the plan, an amount necessary to amortize such credits in equal annual payments (until fully amortized) over 10 years, as determined under regulations prescribed by the Secretary.

Code section 404(a)(6) provides that for purposes of sections 404(a)(1), (2) and (3), a taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).

Revenue Ruling 76-28, 1976-1 C.B. 106, provides that whether a taxpayer is on the cash or accrual method of

accounting and whether or not the conditions for accrual otherwise generally required of accrual basis taxpayers have been met, a payment made after the close of an employer's taxable year to which amended section 404(a)(6) applies shall be considered to be on account of the preceding taxable year if (a) the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer, and (b) either of the following conditions is satisfied: (1) the employer designates the payment in writing to the plan administrator or trustee as a payment on account of the employer's preceding taxable year, or (2) the employer claims such payment as a deduction on his tax return for such preceding taxable year.

Section 404(a)(7) of the Code states in pertinent part: If amounts are deductible under paragraphs (1) and (3), or (2) and (3), or (1), (2), and (3), in connection with 2 or more trusts, or one or more trusts and an annuity plan, the total amount deductible in a taxable year under such trusts and plans shall not exceed the greater of 25 percent of the compensation otherwise paid or accrued during the taxable year to the beneficiaries of the trusts or plans, or the amount of contributions made to or under the trusts or plans to the extent such contributions do not exceed the amount of employer contributions necessary to satisfy the minimum funding standard provided by section 412 for the plan year which ends with or within such taxable year (or for any prior plan year).

Therefore, based on the representations made and the authorities cited with respect to ruling requests, numbers 1 and 2, we conclude:

(1) For Company M's taxable year 1980, the contributions to Plan X and Plan Y made (a) during the calendar year 1980 and (b) during the period in 1981 up to the due date for filing the 1980 income tax return (including extensions thereof), are deductible for the taxable year 1980, pursuant to Code sections 404(a)(1) and 404(a)(6) and subject to the limitations of Code sections 404(a)(1)(A)(iii) and 404(a)(7).

(2) For Company M's taxable year 1981, contributions to Plan X and Plan Y made (a) during the calendar year 1981 not deducted in 1980, and, (b) during the period in 1982 up to the due date for filing the 1981 income tax return (including extensions thereof), are deductible for the taxable year 1981, pursuant to Code sections 404(a)(1) and 404(a)(6) and subject to the limitations of Code sections 404(a)(1)(A)(iii) and 404(a)(7).

Section 481(a) of the Code provides, in part, that in computing the taxpayer's taxable income for any taxable year (referred to in this section as the "year of change") (1) if such computation is under a method of accounting different from the method under which the taxpayer's taxable income for the preceding taxable year was computed, then (2) there shall be taken into account those adjustments which are determined to be necessary solely by reason of the change in order to prevent amounts from being duplicated or omitted.

Section 1.446-1(e)(2)(ii)(b) of the Income Tax Regulations provides, in part, that a change in method of accounting does not include adjustment of any item of income or deduction which does not involve the proper

time for the inclusion of the item of income or the taking of a deduction.

Under the provisions of section 404-(a)(6) of the Code and Rev. Rul. 76-28, Company M is allowed to accrue as a deduction those payments made to its plan after the close of the taxable year but before the filing of the tax return for the year. Prior to the taxable year ended December 31, 1980, Company M had not availed itself of the provisions of section 404(a)(6) and Rev. Rul. 76-28 to accrue the deductions for those payments made to the plans after the close of the taxable year. A change by Company M to avail itself of these provisions does not give rise to an adjustment under section 481(a) of the Code since there is no change in method of accounting. The change in the time for payment does not give rise to a change in the proper time for the taking of the deduction, but only involves a change in the year of payment.

Accordingly, based on the facts presented and the representations made by the taxpayer, we conclude that, with respect to the ruling request number 3, proposed additional accruals to Company M's retirement plans to be deducted in Company M's federal income tax returns for the taxable years ended December 31, 1980, and December 31, 1981, made pursuant to the provisions of section 404(a)(6) of the Code and Rev. Rul. 76-28, are not adjustments that need to be taken into account under the provisions of section 481(a) of the Code.

Section 412(b)(3)(A) of the Code states that the funding standard account shall be credited with the amount considered contributed by the employer to or under the

plan for the plan year. Company M reports certain contributions actually made to each of the plans in calendar year 1980 and certain contributions made to each of the plans in calendar year 1981. In each plan, the plan year is the calendar year. Therefore, contributions made in calendar year 1980 are contributions made for plan year 1980, and likewise for 1981, unless the employer designates otherwise.

Accordingly, with respect to ruling request number 4, we conclude that Company M may recognize, as credits to the funding standard accounts for each of the two plans for the plan years 1980 and 1981, the respective contributions made to those plans during those plan years.

The above rulings are based on the assumption that Plan X, Plan Y, and Plan Z are qualified under section 401(a) of the Code and their related trusts tax-exempt under section 501(a) at the time contributions are made to those plans.

A copy of this ruling letter has been sent to your authorized representative in accordance with the power of attorney on file in this office.

PRIVATE RULING 8526068 printed in FULL format.

PRIVATE RULING 8526068

"This document may not be used or cited as precedent. Section 6110(J)(3) of the Internal Revenue Code."

SECTION 0404
Deduction for Contributions of an Employer to an Employee's Trust or Annuity Plan and Compensation Under a Deferred Payment Plan (Deductible v. Not Deductible)

0404.00-00

PRIVATE RULING 8526068; 1985 PRL LEXIS 3903

DATE: April 4, 1985

[*1]

Dear * * *

This is in response to a request for a ruling dated- * * * submitted by your authorized representative on your behalf concerning the federal tax consequences of contributions to Plan X.

Corporation M maintains Plan X, a defined benefit plan, for the benefit of its employees. Both Corporation M and Plan X are on a fiscal year ending June 30.

The actuarial report for the plan year ended June 30, 1983 indicates that the maximum deductible amount for 1983 as determined under section 404(a)(1)(A)(iii) of the Code is $7,501,741.00. Corporation M paid $6,550,000 to Plan X in July of 1982.

Corporation M has been granted an extension of time to file its corporate tax return for its taxable year ended June 30, 1983 until March 15, 1984.

The actuarial report for the plan year ended June 30, 1984 indicates that the maximum deductible amount for 1984 as determined under section 404(a)(1)(A)(iii) of the Code is $7,916,321.00. Corporation M paid $6,958,000.00 to Plan X in July of 1983.

Corporation M proposes to deduct the following sums on its corporate tax return for its taxable year ended June 30, 1983:

(1) $6,550,000.00: contributed in July of 1982; plus

(2) $951,751: [*2] out of the contribution of $6,958,000.00 made to Plan X during July of 1983.

Therefore, Corporation M proposes to deduct $7,501,741 under section 404(a)(6) of the Code for its taxable year ended June 30, 1983, as the maximum allowable deduction under section 404(a)(1)(A)(iii) for the plan year ended June 30, 1983.

Based on the foregoing, the following rulings are requested:

(1) For its taxable year ended June 30, 1983, the contributions to Plan X made

(a) during the taxable year ended June 30, 1983; and

(b) during the period up to the due date for filing the taxable year ended June 30, 1983 income tax return (including extensions thereof)

are deductible for the taxable year ended June 30, 1983 pursuant to Code section 404(a)(6), but limited to the amount described in Code section 404(a)(1)(A)(iii).

(2) The proposed deduction for the taxable year ended June 30, 1983 is not subject to any adjustment of taxable income under Code section 481.

Section 404(a) of the Code provides, in part, that if contributions are paid by an employer to or under a pension plan, such contributions shall not be deductible under section 162 (relating to trade or business expenses) or section 212 [*3] (relating to expenses for the production of income); but if they satisfy the conditions of either of such sections, they shall be deductible under this section, subject, however, to the following limitations as to amounts deductible in any year: (1)(A) in the taxable year when paid, if the contributions are paid into a pension trust, and if such taxable year ends within or with a taxable year of the trust for which the trust is exempt under 501(a), in an amount determined as follows: (iii) an amount equal to the normal cost of the plan, as dtermined [sic] under regulations prescribed by the Secretary, plus, if past service or other supplementary pension or annuity credits are provided by the plan, an amount necessary to amortize such credits in equal annual payments (until fully amortized) over 10 years, as determined under regulations prescribed by the secretary.

Code section 404(a)(6) provides that for purposes of sections 404(a)(1), (2) and (3), a taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made later than the time prescribed by law for

filing the return for such taxable year [*4] (including extensions thereof).

Revenue Ruling 76-28, 1976-1 C.B. 106, provides that whether a taxpayer is on the cash or accrual method of accounting and whether or not the conditions for accrual otherwise generally required of accrual basis taxpayers have been met, a payment made after the close of an employer's taxable year to which amended section 404(a)(6) applies shall be considered to be on account of the preceding taxable year if (a) the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer, and (b) either of the following conditions is satisfied: (1) the employer designates the payment in writing to the plan administrator or trustee as a payment on account of the employer's preceding taxable year, or (2) the employer claims such payment as a deduction on his tax return for such preceding taxable year.

Section 404(a)(7) of the Code states in pertinent part: If amounts are deductible under paragraphs (1) and (3), or (2) and (3), or (1), (2), and (3), in connection with two or more trusts, or one or more trusts and an annuity plan, the total amount deductible in [*5] a taxable year under such trusts and plans shall not exceed the greater of 25 percent of the compensation otherwise paid or accrued during the taxable year to the beneficiaries of the trusts or plans, or the amount of contributions made to or under the trusts or plans to the extent such contributions do not exceed the amount of employer contributions necessary to satisfy the minimum funding standard provided by

section 415 for the plan year which ends with or within such taxable year (or for any prior plan year).

Therefore, we conclude with respect to ruling request number one, that contributions made by Corporation M (a) during its 1982 taxable year, and (b) during the period of time represented by the extension to file its corporate tax return, (up to and including March 15, 1984) are deductible for Corporation M's taxable year ended June 30, 1983, to the extent allowed under section 404(a)(1)(A)(iii) of the Code, pursuant to sections 404(a)(1) and 404(a)(6) thereof.

Section 481(a) of the Code provides, in part, that in computing the taxpayer's taxable income for any taxable year (referred to in this section as the "year of change") (1) if such computation is under a method [*6] of accounting different from the method under which the taxpayer's taxable income for the preceding taxable year was computed, then (2) there shall be taken into account those adjustments which are determined to be necessary solely by reason of the change in order to prevent amounts from being duplicated or omitted.

Section 1.446-1(e)(2)(ii)(b) of the Income Tax Regulations provides, in part, that a change in method of accounting does not include adjustment of any item of income or deduction which does not involve the proper time for the inclusion of the item of income or the taking of a deduction.

Under the provisions of section 404(a)(6) of the Code and Rev. Rul. 76-28, the taxpayer is allowed to accrue as a deduction those payments made to its plan after the close of the taxable year but before the filing of the tax return

for the year. Prior to the taxable year ended June 30, 1983, the taxpayer had not availed itself of the provisions of section 404(a)(6) and Rev. Rul. 76-28 to accrue the deductions for those payments made to the plans after the close of the taxable year. A change by the taxpayer to avail itself of these provisions does not give rise to an adjustment under [*7] section 481(a) of the Code since there is no change in method of accounting. The change in the time for payment does give rise to a change in the proper time for the taking of the deduction, but only involves a change in the year of payment.

Accordingly, based on the facts presented and the representations made by the taxpayer, we conclude that, with respect to ruling request number two, proposed additional accruals to the taxpayer's retirement plans to be deducted in the taxpayer's federal income tax returns for the taxable year ended June 30, 1983, made pursuant to the provisions of section 404(a)(6) of the Code and Rev. Rul. 76-28, are not adjustments that need to be taken into account under the provisions of section 481(a) of the Code.

The foregoing rulings are based on the assumption that Plan X is qualified under section 401(a) of the Code and that the related trust is tax-exempt under section 501(a) at the relevant time.

Sincerely yours,

John J. Swieca
Chief, Employee Plans Rulings and
Qualifications Branch

LTR 8543002, April 30, 1985

Symbol: Not given

NATIONAL OFFICE
TECHNICAL ADVICE MEMORANDUM

[Code Sec. 414]

Definitions and special rules; Defined benefit plan. – *CCH.*

ISSUE

Whether contributions that are made to a pension plan after the end of a company's taxable year but before the due date for filing its federal income tax return, including extensions, may be deductible for that prior taxable year.

FACTS

The taxpayer is a corporation that files its federal income tax returns on a calendar year basis. The taxpayer maintains a defined benefit pension plan whose plan year is the calendar year. A payment to fund benefits is made by the taxpayer each month based on total monthly salary.

Through 1976, the taxpayer deducted as a pension expense for each taxable year, only those amounts contributed during the calendar, taxable year. In 1977, the taxpayer deducted as a pension expense not only those amounts contributed to the plan during taxable year

1977, but, in addition, those amounts contributed monthly from January 1978 through August 1978.

For taxable year 1978, the taxpayer deducted as a pension expense those amounts contributed to the plan from September 1978 through December 1978 and, additionally, those amounts contributed to the plan from January 1979 through August 1979. For taxable years 1979 through 1981, respectively, the taxpayer contained to deduct as a pension expense those amounts contributed to the plan during the period September through December of that particular taxable year and contributed to the plan during January through August of the succeeding calendar year.

The taxpayer's income tax returns from 1977 through 1981 were filed timely – prior to September 15th of each year – after the taxpayer had filed for an automatic extension of time within which to file its returns.

LAW AND RATIONALE

Section 404(a)(1)(A) of the Internal Revenue Code allows a deduction for contributions paid into a pension trust, subject to certain limitations, in the taxable year when paid, and if such taxable year ends within or with a taxable year of the trust for which the trust is exempt under section 501(a).

Section 404(a)(6) of the Code provides that, for purposes of the deductible limits for pension plans set forth in section 404(a)(1), (2) and (3), a taxpayer will be deemed to have made payment of a contribution to a qualified pension plan on the last day of the preceding taxable year

if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).

Section 1.404(a)-14(c) of the Income Tax Regulations sets forth the rules for determining the deductible limit under section 404(a)(1)(A) of the Code for defined benefit plans. This section provides that, although the deductible limit applies for an employer's taxable year, the deductible limit is determined on the basis of a plan year. If the employer's year does not coincide with the plan year, the deductible limit under section 404(a)(1)(A)(i), (ii), or (iii), for a given taxable year of the employer is one of the following alternatives:

(1) The deductible limit determined for the plan year commencing within the taxable year;

(2) The deductible limit determined for the plan year ending within the taxable year; or

(3) A weighted average of alternatives (1) and (2). Such an average may be based, for example, upon the number of months of each plan year falling within the taxable year.

The employer must use the same alternative for each taxable year unless consent to change is obtained from the Commissioner under section 446(e).

Rev. Rul. 76-28, 1976-1 C.B. 107, provides guidelines for the application of Code section 404(a)(6) and states, in part, as follows:

Whether a taxpayer is on the cash or accrual method of accounting, and whether or not the conditions for

accrual otherwise generally required of accrual basis taxpayers have been met, a payment made after the close of an employer's taxable year to which amended section 404(a)(6) applies shall be considered to be on account of the preceding taxable year if (a) the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer, and (b) either of the following conditions is satisfied.

(1) The employer designates the payment in writing to the plan administrator or trustee as a payment on account of the employer's preceding taxable year, or

(2) The employer claims such payment as a deduction on his tax return for such preceding taxable year.

Thus, Rev. Rul. 76-28 allows a taxpayer to treat a payment to its pension plan in a succeeding taxable year to be considered as "on account of" the preceding taxable year as provided in Code section 404(a)(6) if the conditions specified in the revenue ruling are met. However, the principles contained in Rev. Rul. 76-28 regarding the application of section 404(a)(6) are related only to the timing of contributions for deduction purposes and do not affect the computation of the plan's deductible limit under section 404(a).

CONCLUSION

Here, the taxable years in question are 1980 and 1981. Because the contributions made in 1981 for taxable year 1980 and in 1982 for taxable year 1981 were made prior to the extended due date for filing the respective year's

income tax returns, the taxpayer is entitled to claim a deduction for those succeeding year contributions on the prior year's tax returns. These deductions may, of course, be taken only to the extent they do not exceed the maximum deductible limits of section 404 for taxable years 1980 and 1981, respectively.

Moreover, because there is no indication that there has been a change in the alternative as described in section 1.404(a)-14(c) of the regulations, the requirements of section 446(e) of the Code, pertaining to change of accounting method, are not applicable.

LTR 7945115, August 8, 1979

Symbol: E:EP:T:2

[Code Sec. 404]

Deduction for contributions of an employer to an employees trust or annuity plan and compensation under a deferred-payment plan; Deductible v. not deductible; Year of deduction; 1978 deduction for 1979 contribution. – CCH.

Your recent letter, submitted on Corporation M's behalf by its authorized representative, requested a ruling with respect to Corporation M's deductions for contributions made to its pension plans for 1978 under section 404(a)(6) of the Internal Revenue Code.

The ruling request states that Corporation M, whose taxable year is the calendar year, has adopted some defined benefit pension plans which provide retirement and other benefits for its salaried and hourly employees. Corporation M has received determination letters that these plans and their related trusts qualify pursuant to section 401(a) of the Code.

The request also states that Corporation M is in the process of obtaining a report from an actuary indicating the minimum funding standard amount and also the maximum deductible contribution with respect to its plans for the calendar year 1978. With respect one of its plans for example, Corporation M anticipates the minimum funding standard amount for calendar year 1978 will be approximately $2,000,000 and the maximum deductible contribution will be approximately $3,230,000. During the calendar year 1978, Corporation M contributed approximately $2,500,000 to the plan. Corporation M

also anticipates that it will contribute in excess of $750,000 during 1979 but prior to filing its income tax return for 1978. For financial reporting purposes, the contributions made in 1979 were not accrued as of December 31, 1978.

Corporation M proposes to claim a deduction on its 1978 tax return for contributions it makes in 1979 for the 1979 plan year prior to filing its 1978 income tax return to the extent the deduction does not exceed the maximum deductible contribution for 1978. Based on the foregoing, it is requested that a ruling be issued that the requirement of section 404(a)(6) of the Code that "the payment is on account of" 1978 will be met if Corporation M claims such payments as a deduction on its 1978 income tax return.

Section 404(a)(6) of the Code provides for purposes of paragraphs (1), (2), and (3) of section 404(a), a taxpayer shall be deemed to have made payment of a contribution to a qualified retirement plan on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the income tax return for such taxable year (including extensions thereof).

Section 11.412(c)-12(b) of the Temporary Income Tax Regulations states that the rules relating to the time a contribution to a plan is deemed made for purposes of minimum funding under Code section 412 are independent from the rules contained in section 404(a)(6) relating to the time a contribution to a plan is deemed made for purposes of claiming a deduction for such contribution under section 404.

Revenue Ruling 76-28, 1976-1 C.B. 107, provides rules for the application of section 404(a)(6) of the Code. It states as follows:

"Whether a taxpayer is on the cash or accrual method of accounting, and whether or not the conditions for accrual otherwise generally required of accrual basis taxpayers have been met, a payment made after the close of an employer's taxable year to which amended section 404(a)(6) applied shall be considered to be on account of the preceding taxable year if (a) the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer, and (b) either of the following conditions is satisfied.

(1) The employer designates the payment in writing to the plan administrator or trustee as a payment on account of the employer's preceding taxable year, or (2) The employer claims such payment as a deduction on his tax return for such preceding taxable year.

The rules contained in Rev. Rul. 76-28 regarding the application of Code section 404(a)(6) are related only to the timing of contributions for deduction purposes. Revenue Ruling 77-82, 1977-1 C.B. 121, has concluded that it would be possible for the same contribution to be deductible under section 404 of the Code for the employer's 1975 taxable year and also be credited for minimum funding purposes under Code section 412 for the 1976 plan year, if the contribution was made in the 1976 plan year but within the time prescribed by section 404(a)(6) of the Code for the 1975 taxable year.

Therefore, we conclude that if Corporation M makes a contribution in 1979 for the 1979 plan year prior to its filing its 1978 tax return, Corporation M is entitled to claim a deduction for such contribution to the extent the deduction does not exceed the maximum deductible contribution for 1978. (See Rev. Rul. 77-82, 1977-1 C.B. 121) Furthermore, such a payment will be considered "on account of" 1978 for deduction purposes as required by section 404(a)(6) of the Code.

A copy of this ruling letter has been sent to your authorized representative in accordance with the power of attorney on file in this office.

LTR 8042133, July 25, 1980

Symbol: E:EP:T:2

[Code Sec. 404]

Deductions for contributions of an employer to an employees trust or annuity plan and compensation under a deferred payment plan; Deductible v. not deductible; Year of deduction; Contributions made after close of fiscal year. – CCH.

In a letter dated June 6, 1980, your authorized representative requested rulings on your behalf concerning the year of deductibility of certain contributions made by Corporation M to Plan X and Plan Y.

Corporation M maintains Plan X and Plan Y, defined benefit plans, which are qualified and tax-exempt under sections 401(a) and 501(a) of the Internal Revenue Code. Both plans use calendar years as plan years. Corporation M's taxable year is the fiscal year ending October 31.

Corporation M makes periodic contributions to Plan X and Plan Y based on cash flow requirements, maintenance of the funding standard account of Plans X and Y under Code section 412 and the deductibility of such contributions under Code section 404.

Contributions made by Corporation M to Plan X and Plan Y may be separated into the following three deductible categories.

Category A: Contributions made during the taxable year and deducted pursuant to section 404(a)(1)(A) of the Code for such years.

Category B: Contributions accrued as of the taxable year end, and made prior to filing Corporation M's tax

return for such taxable year, and deducted pursuant to Code sections 461(a) and 404(a)(6).

Category C: Contributions not accrued as of the taxable year end but made prior to filing Corporation M's tax return for such taxable year and deducted pursuant to Code section 404(a)(6) and Revenue Ruling 76-28, 1976-1 C.B. 106.

Total contributions and deductions for each fiscal October 31 taxable year were within the maximum deductible limits of Code sections 404(a)(1) and 404(a)(7) for each calendar Plan Year and met the minimum funding standards of section 412 for Plans X and Y.

Assuming the following proposed contributions will continue to be within the deductible limits imposed by Code sections 404(a)(1) and 404(a)(7) to cover normal costs and a portion of the past service cost of each Plan for each fiscal October 31 taxable year and will meet the minimum funding standards of Code section 412 for each calendar Plan year, Corporation M proposes to make and deduct the following contributions to Plans X and Y:

October 31, 1979, Fiscal Year

(1) *Category A Contributions:* During Corporation M's fiscal year, ending October 31, 1979, Corporation M made Category A contributions to Plans X and Y.

(2) *Category B Contributions:* Corporation M accrued Category B contributions prior to its October 31, 1979 year end. Such Category B contributions will be fully paid to Plans X and Y prior to July 15, 1980, the latest date for filing Corporation M's October 31, 1979, fiscal

year end tax return. These contributions will be treated by Plans X and Y for tax purposes in the same manner they would treat payments received on the last day of Corporation M's 1979 taxable year and will be claimed as a deduction on Corporation M's tax return for fiscal year 1979.

(3) *Category C Contributions*: Corporation M proposes to make additional contributions to the Plans prior to July 15, 1980, as Category C contributions. Such Category C contributions will be treated by the Plans for tax purposes in the same manner that the Plans would treat a payment actually received on the last day of Corporation M's October 31, 1979 taxable year, and will be claimed as a deduction on Corporation M's tax return for fiscal year 1979.

October 31, 1980, Fiscal Year

(1) *Category A Contributions*: Between July 15, 1980, and October 31, 1980, Corporation M proposes to make Category A contributions to the Plans, in order to meet cash flow requirements of the trusts for such period. Such Category A contributions will be deducted by Corporation M on its October 31, 1980, fiscal year and tax return.

(2) *Category B Contributions*: Corporation M does not propose to make any Category B contributions to the Plans for the year ending October 31, 1980.

(3) *Category C Contributions:* Corporation M does not propose to make any Category C contributions to the Plans for the year ending October 21, 1980.

October 31, 1981 Fiscal Year

(1) *Category A Contributions:* Corporation M proposes to make contributions to the Plans as Category A contributions during the period November 1, 1980, through October 31, 1981. Company M proposes to change its 1979 and prior years' practice of electing to treat certain of such contributions made subsequent to its fiscal year end and prior to filing its tax return for such fiscal year, as Category C contributions deductible on its tax return for such fiscal year.

Corporation M proposes to accomplish this by nor [sic] treating payments made during the period beginning November 1, 1980, and ending July 15, 1981 (the latest date for filing its October 31, 1980, fiscal year end tax return) in the same manner that it would treat a payment actually received on the last day of such preceding taxable year, and will not claim such payments as a deduction on its return for the October 31, 1980, year end.

(2) *Category B Contributions*: Corporation M does not propose to accrue any amount as a contribution to the Plans as of October 31, 1981.

(3) *Category C Contributions:* Corporation M proposes to make contributions to the Plans during the period November 1, 1981, through July 15, 1982 (the latest date for filing its October 31, 1981, fiscal year tax return) as Category C contributions. For tax purposes, such contributions will be treated by the Plans in the same manner that the Plans would treat a payment actually received on the last day of Corporation M's October 31, 1981, taxable year, and such contributions will be claimed as deductions on Corporation's tax return for such year.

Based on the foregoing, the following rulings are requested:

(1) Category A contributions for Corporation M's fiscal years ending October 31, 1979, October 31, 1980, and October 31, 1981, as described above, will be deductible for each such fiscal year, pursuant to section 404(a)(1)(A) of the Code.

(2) Category B contributions for Corporation M's fiscal year ending October 31, 1979, as described above, will be deductible on Corporation M's October 31, 1979, fiscal year tax return, pursuant to section 461(a) and section 404(a)(6) of the Code.

(3) Category C contributions for Corporation M's fiscal years ending October 31, 1979, and October 31, 1981, as described above, will be deductible for each such fiscal year, pursuant to section 404(a)(6) of the Code and Revenue Ruling 76-28.

(4) The Plan years to which Category A, B, and C contributions are attributable under Code section 412 for minimum funding purposes are independent of and are not controlled by the rules contained in section 404(a)(6) relating to the time such contributions are deemed to be made for purposes for claiming a deduction for such contributions under section 404 of the Code.

(5) Category B contributions for the years ending October 31, 1980, and October 31, 1981, and thereafter are not necessary in light of Revenue Ruling 76-28 and section 11.412(c)-12(b) of the Temporary Income Tax Regulations, because they supersede the accrual rules of section 461(a) of the Code with respect to the amount of the

deduction made to a qualified plan under section 404 of the Code.

Code section 404(a)(1)(A) provides that contributions made by an employer to a pension trust, subject to the minimum funding standards of section 412 and limits an [sic] deduction of section 404(a)(7), to be deductible in the taxable year when paid, if such taxable year ends with or within a taxable year of the trust for which the trust is exempt under section 501(a).

In this situation, the Category A contributions are to be paid by Corporation M within its taxable years 1979, 1980 and 1981. Corporation M's taxable year ends within the plan year of Plans X and Y.

Since the contributions are being paid within Corporation M's taxable year which ends within Plans X and Y's plan year, we conclude, with respect to ruling request 1, that Category A contributions are deductible for Code section 404(a)-(1)(A) purposes in the taxable years when they are paid.

Revenue Ruling 76-28, provides rules for the application of section 404(a)(6) of the Code. It states as follows:

> Whether a taxpayer is on the cash or accrual method of account, and whether or not the conditions for accrual otherwise generally required of accrual basis taxpayers have been met, a payment made after the close of an employer's taxable year to which amended section 404(a)(6) applies shall be considered to be on account of the preceding taxable year if (a) the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of

the employer, and (b) either of the following conditions is satisfied.

(1) The employer designates the payment in writing to the plan administrator or trustee as a payment on account of employer's preceding taxable year, or

(2) The employer claims such payment as a deduction on his tax return for such preceding taxable year.

Category B contributions for fiscal year 1979, are to be paid in 1980 prior to the latest date for filing Corporation M's 1979 tax return. Category C contributions are to be paid in 1980 and 1982 respectively prior to the latest date for filing Corporation M's tax return for fiscal [sic] 1979 and 1981 respectively. All these contributions will be claimed by Corporation M as deductions for the fiscal years preceding the years paid.

Since Corporation M intends to designate Category B and C as payments for the employer's preceding fiscal taxable year and to claim them as deductions for the respective preceding fiscal years, the requirements of Revenue Ruling 76-28 are met.

Therefore, we conclude, with respect to ruling requests 2 and 3 that Category B contributions, as described above, will be deductible by Corporation M for its 1979 fiscal year. In addition, Category C contributions made in years 1980 and 1982, as described above will be deductible by Corporation M for its fiscal years 1980 and 1981 respectively.

Section 11.412(c)-12(b) of the Temporary Income Tax Regulations states that the rules relating to the time a

contribution to a plan is deemed made for purposes of minimum funding under Code section 412 are independent from the rules contained in section 404(a)(6) relating to the time a contribution to a plan is deemed made for purposes of claiming a deduction for such contribution under section 404.

Since the rules relating to the time a contribution is deemed made under Code section 412 are independent from the rules relating to the time a contribution is deemed made under section 404, we conclude, with respect to ruling request 4, that the plan years to which Category A, B and C contributions are attributable under section 412 are not controlled by the rules contained in section 404(a)-(6).

In regards to ruling request 5, as clarified by your authorized representative, the rules stated in Revenue Ruling 76-28 are applicable without regard to the accrual rules which otherwise are required to be met.

Accordingly, we conclude that accrual of contributions is not necessary in order to claim deductions under Code section 404(a)(6) as long as the requirements of Revenue Ruling 76-28 are met.

These rulings are based on the assumption that Plans X and Y and the related trusts will be qualified and tax-exempt under section 401(a) and 501(a) of the Code at the time the above described deductions are made.

A copy of this letter has been sent to your authorized representative in accordance with the power of attorney on file in this office.

LTR 8111082, December 18, 1980

Symbol: E:EP:T:2

[Code Sec. 404]

Deduction for contributions of an employer to an employees trust or annuity plan and compensation under a deferred payment plan; Deductible v. not deductible; Year of deduction; Defined benefit plan. – CCH.

This is in response to your ruling request concerning the year of deductibility of certain contributions made by Corporation M to Plan X.

Corporation M, whose taxable year is the calendar year, maintains Plan X, a defined pension plan, whose plan year is a calendar year. Plan X has been held by the Internal Revenue Service to be qualified and the related trust tax-exempt under sections 401(a) and 501(a) of the Internal Revenue Code. Some participants of Plan X participate in other plans. In 1980, Corporation M will contribute to Plan X an amount sufficient to satisfy the minimum funding standard for such year. Under the pension funding program adopted by Corporation M, it would normally contribute to Plan X about $ t during the last quarter of 1980 and about $ u in January 1981. However, only about $ v will be contributed to the plan during the last quarter of 1980, and about $ w will be contributed in January 1981. For Corporation M's financial accounting and reporting purposes a liability will be accrued for 1980 in the amount of $ w and such liability will be discharged by the contribution made in January 1981. A written statement will be made by Corporation M to the plan administrator and trustee indicating that the contribution made in January 1981 is not on account of taxable year

1980, that it will not be included in the contributions claimed as a deduction for such year, and that such statement does not characterize or disclose Corporation M's financial accounting treatment of the contribution.

Corporation M proposes to include in the amount of the contributions claimed as a deduction on its 1981 tax return the amount of the contribution made in January 1981, subject to the maximum amount deductible for 1981. Some of the contributions made in 1981 may be included in the amount claimed as a deduction on its 1980 tax return.

Based on the foregoing, the following ruling is requested:

The contribution by Corporation M to plan x that will be made in January 1981 in the amount of about $ w, is deductible for the taxable year 1981, to the extent that the contribution is not claimed as a deduction on the federal income tax returns for the year 1980, subject to applicable limitations under sections 404(a)(1) and 404(a)(7) of the Code, on amounts deductible.

Code section 404(a)(1) provides, in general, that contributions to a pension trust are deductible in the taxable year when paid, if such taxable year for which the trust is exempt under Code section 501(a).

Under Code section 404(a)(6) a taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year.

Rev. Rul. 76-28, 1976-1 C.B. 107, provides rules for the application of section 404(a)(6) of the Code. It states as follows:

> "Whether a taxpayer is on the cash or accrual method of accounting, and whether or not the conditions for accrual otherwise generally required of accrual basis taxpayers have been met, a payment made after the close of an employer's taxable year to which amended section 404(a)(6) applies shall be considered to be on account of the preceding taxable year if (a) the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer, and (b) either of the following conditions is satisfied.
>
> (1) The employer designates the payment in writing to the plan administrator or trustee as a payment on account of the employer's preceding taxable year, or
>
> (2) The employer claims such payment as a deduction on his tax return for such preceding taxable year.

In the instant case, of the amount contributed in January 1981, only the amount claimed as a 1980 deduction meets the requirements of Rev. Rul. 76-28.

Accordingly, we conclude that the contribution by Corporation M to Plan X that will be made in January 1981 in the amount of $ w is deductible for the taxable year 1981 to the extent that the contribution is not claimed as a deduction on the federal income tax returns for the year 1980, subject to applicable limitations under

sections 404(a)(1) and 404(a)(7) of the Code on amounts deductible.

The ruling is based on the assumption that Plan X and its related trusts will be qualified and tax-exempt under sections 401(a) and 501(a) of the Code at the time the above-described deductions are made.

[LOGO] **U.S. Department of Justice**

Tax Division

Please reply to: Appellate Section
Facsimile No. (202) 514-8456 P.O. Box 502
Telephone No. (202) 514-3361 Washington, D.C 20044

SWParks
5-20385
CMN 9830030

March 20, 1998

FEDERAL EXPRESS
Patrick Fisher, Esquire
Clerk, U. S. Court of Appeals
for the Tenth Circuit
Byron White United States Courthouse
1823 Stout Street
Denver, CO 80257

Re: American Stores Co. and Subsidiaries v. Commissioner (10th Cir. No. 97-9025)

Dear Mr. Fisher:

The above-entitled case has been fully briefed, but has not yet been scheduled for oral argument. In connection with the case, appellants have filed a request seeking judicial notice of various facts, which the Government opposed. That motion remains pending in this case. In *Lucky Stores v. Commissioner* (9th Cir. No. 9770810), a case that presents the same issue under Section 404 (a) (6) as is presented in the present case, counsel for the taxpayer therein, who is also counsel for *American Stores*, filed a similar request for judicial notice, and has requested that we make certain inquiries of the IRS regarding matters

addressed in the request for judicial notice, and advise the Court regarding these matters. We anticipate that counsel will make the same request in the present case. While we believe that these matters have been thoroughly dealt with in our prior submissions, and that, contrary to the suggestion of opposing counsel's letter of March 10, 1998 (a copy of which is attached), we are under an ethical obligation to comply with his demands, we are nevertheless submitting this letter to the Court to remove any doubt as to whether we are disputing the correctness of certain of taxpayer's allegations regarding the facts underlying three Technical Advice Memoranda (TAMs) on which they have relied, or that the material submitted with the motions for judicial notice in the Tax Court and in this Court would appear to show that certain statements made by counsel for the Commissioner on brief in the Tax Court in the present case regarding the facts underlying those TAMs were incorrect.

At the outset, we wish to emphasize that we adhere to the contentions made in our opposition to the request for judicial notice, and that we continue to contest whether taxpayers have made a valid case for invoking judicial notice. That having been said, we note that taxpayers request judicial notice that three technical advice memoranda, TAM 8210014, TAM 8303002 and TAM 8714008, involved collectively bargained, multi-employer plans. In that regard, taxpayers also point out in their opening brief on appeal (at 10) and in their reply brief (at 22) that the Commissioner's trial counsel stated on brief in the Tax Court that only one TAM (TAM 8210014) may have involved a multi-employer plan, although trial

counsel did state that that TAM involved a collectively bargained plan.

Significantly, only TAM 8210014 states on its face that it involved a collectively bargained plan, and the Commissioner's trial counsel correctly pointed that out to the Tax Court. The remaining two TAMs do not state or otherwise indicate on their face that they involved collectively bargained plans, and none of the three TAMs state on their face that the plans involved were multi-employer plans.

Nevertheless, we acknowledge that it appears from certain of the documents of which taxpayers have requested that this Court take judicial notice that all three TAMs involved collectively bargained, multi-employer plans. Indeed, we have not asserted otherwise on these appeals, and though we continue to believe that Section 6103 of the Internal Revenue Code would prevent us from obtaining or disclosing information from the IRS's files that would specifically confirm or deny the point. Nevertheless, based on taxpayer's submissions (the bulk of which had also been presented to the Tax Court), it would appear that statements to the contrary made by counsel for the Commissioner on brief to the Tax Court in thje [sic] present case were incorrect. Accordingly, notwithstanding that the TAMs do not so state, based upon the documents produced by taxpayers, we do not dispute the assertion that all three TAMs involved collectively bargained, multi-employer plans.

Our contentions concerning the role of the TAMs to the proper resolution of this case are set forth in our

answering brief at pages 30-34. Please note that our arguments, as set forth therein, are in no way altered based on the fact that three, rather than one, of the TAMs cited by taxpayers apparently involved collectively bargained plans, and the three TAMs involved multi-employer plans.

We are enclosing the original and three copies of this letter for distribution to the panel to be assigned to this case. This case is currently assigned to the undersigned attorney, who may be reached at (202) 514-2958.

Sincerely yours,

/s/ Steven W. Parks
STEVEN W. PARKS
Attorney
Appellate Section

cc: Paul J. Sax, Esquire
Richard E.V. Harris, Esquire
Orrick, Herrington & Sutcliffe, LLP
Old Federal Reserve Bank Building
400 Sansome Street
San Francisco, CA 94111-2143

Airborne Freight Corporation, Plaintiff v.
United States of America, Defendant.

No. C95-301R

United States District Court for the
Western District of Washington

November 6, 1995, Dated
November 7, 1995, Filed, Entered

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

ROTHSTEIN, District Judge: THIS MATTER comes before the court on cross-motions for summary judgment by plaintiff Airborne Freight Corporation and defendant United States of America.[1] Having reviewed the motions together with all documents filed in support and in opposition and being fully advised, the court finds and rules as follows:

I. FACTUAL BACKGROUND

This case involves the issue of whether plaintiff Airborne Freight Corporation ("AFC") can claim certain deductions pursuant to the Internal Revenue Code for contributions made to several multi-employer defined benefits pension plans. As an employer subject to various collective bargaining agreements, AFC contributes to the

---

[1] Defendant's motions for leave to file overlength response and reply briefs are GRANTED.

plans on a monthly basis at a set rate for specific units of work performed by union employees.

For the tax years ending December 31, 1989 and December 31, 1990, AFC obtained extensions of the time to file its tax returns until September 15, 1990 and September 15, 1991, respectively. On its 1989 return, AFC claims deductions for all contributions made to the multi-employer plans during the 1989 calendar year and during the $8^1/_2$ month period from the end of calendar year 1989 until the extended due date for the 1989 return. On its 1990 return, AFC claimed deductions for all contributions made to the plans from September 16, 1990 through September 15, 1991. The periods between the end of the calendar year and the extended date of filing of the tax returns will hereafter be referred to as the grace periods.

The Internal Revenue Service ("IRS") disallowed all deductions claimed by AFC on these two tax returns for multi-employer plan contributions, which were paid during the grace periods after the end of the calendar years for which the returns were filed. AFC filed this lawsuit on the grounds that it is entitled to receive a refund of the amount paid to the IRS as a result of the disallowance of the deductions claimed for those contributions made during the grace periods. There is no dispute about the material facts, and both AFC and the IRS have filed cross-motions for summary judgment.

II. LEGAL ARGUMENT

A. IRC § 404 and IRS Revenue Ruling 76-28

The deduction of employer contributions to pension plans is governed by § 404 of the Internal Revenue Code ("IRC"). Section 404(a)(6) provides that contributions made to a qualified plan after the close of the employer's tax year, but prior to the extended due date for filing the employer's tax return for that year, are deemed made on the last day of the preceding tax year and are accordingly deductible under § 404(a)(1) if they are made on account of the preceding taxable year.

No regulations interpreting § 404(a)(6) have been issued. However, the IRS has issued Revenue Ruling 76-28, which includes some guidelines for applying § 404(a)(6). That ruling states that employer payments made to a qualified plan after the end of the tax year will be considered to have been made "on account of" the preceding taxable year within the meaning of § 404(a)(6) if (1) the plan treats the payment as it would treat a payment actually received on the last day of the preceding taxable year; and (2) the employer designates the payment in writing to the plan as made on account of the preceding taxable year, or deducts the payment on its tax return on or before the due date of that return, including extensions.

There is no dispute that AFC has met the second requirement. The question is whether the first requirement has been satisfied. Given the nature of multi-employer defined benefits plans and the way in which they operate, the court concludes that it has. The plan treated the contributions which AFC made during the

grace periods just as it treated contributions made before the end of the taxable year. That is, the plan deposited the contributions in one single pooled fund. Neither the amount of the contributions nor the timing, *i.e.*, whether they were made before the end of the tax year or during the succeeding grace period, affected the actual benefits payable to employees.[2]

Thus, the court finds that AFC's actions in claiming deductions for the contributions made during the grace periods are consistent with the language and requirements of § 404(a)(6) as well as satisfying the IRS's own guidelines for applying § 404(a)(6) set forth in Rev. Rul. 76-28.

B. Other IRC Provisions

In order to refute AFC's argument, the IRS invokes several other IRC provisions including § 446, which requires a taxpayer to obtain the IRS Commissioner's

---

[2] In the same vein, the IRS contends that the pension contributions paid in 1990 were not "on account of" the 1989 tax year as required by § 404(a)(6) because the amount of those contributions was calculated based on employee hours worked in 1990, not in 1989. While this is true, the court again notes that there is no connection between the amount of the contributions and the level of benefits paid or to whom they are paid. Thus, the actual date on which the contributions were made and the employee hours on which they were calculated does not affect the plan's payment of benefits. Rev. Rul. 76-28 allows the taxpayer to treat contributions to its pension plan during the grace period as having been made "on account of" the preceding tax year if the taxpayer meets the requirements of that ruling. The court has already found that AFC did so.

approval when changing its method of accounting. The IRS argues that AFC's decision to claim payments made in 1990 as deductions for the tax year ending December 31, 1989 was a change in accounting method for which AFC had to get prior permission from the IRS Commissioner under § 446(e).

The court rejects this argument. AFC's decision to claim certain deductions on its 1989 rather than its 1990 tax return does not constitute a change in accounting methods because it does not affect the computation of the deduction amount or the limit on the deduction. Instead, AFC's decision was purely one of timing as allowed by Congress under § 404(a)(6).

The IRS also cites to IRC § 446(b), which gives the Commissioner discretion to require the taxpayer to use a different accounting method if the Commissioner concludes that the taxpayer's method does not clearly reflect income. As stated above, the court does not believe that an accounting method is involved in this case. Moreover, Congress specifically provided in § 404(a)(6) that a taxpayer is authorized to claim deductions in the manner outlined by the statute.

The IRS's final argument is predicated on the fact that there is a plan-wide deductible limit under IRC § 413(b)(7). In other words, all of the deductions taken by all of the employers contributing to one multi-employer plan cannot exceed a plan-wide limit. This limit is calculated by determining the anticipated contributions for the plan year from all contributing employers. The IRS argues that by taking more of a deduction for the 1989 tax year than had been anticipated, AFC interfered with

other employers' ability to estimate the plan-wide deductible limit.

This argument has no merit. The IRS concedes that AFC claimed the disputed deductions only after having calculated the plan-wide deductible for the 1989 tax year and having ascertained that it would not be exceeded. Because AFC's ability to claim additional deductions was predicated on the fact that it filed its 1989 tax return well after the end of the tax year, it could not have interfered with other employers' ability to calculate and claim their deductions unless they also obtained extensions on the time for filing their tax returns. It seems only fair to require that those employers who choose to file their tax returns later must accept the risk of possible limitations on their ability to claim deductions.

III. CONCLUSION

AFC'S motion for summary judgment is GRANTED; the IRS's cross-motion for summary judgment is DENIED.

Supreme Court, U.S.
FILED
AUG 10 1999
OFFICE OF THE CLERK

(7)

No. 99-160

In the Supreme Court of the United States

AMERICAN STORES COMPANY AND SUBSIDIARIES,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

4 pp

QUESTION PRESENTED

Whether contributions to multiemployer defined benefit pension plans made by petitioner after the close of its 1988 tax year were deductible in that year under Section 404(a)(6) of the Internal Revenue Code, 26 U.S.C. 404(a)(6).

In the Supreme Court of the United States

No. 99-160

AMERICAN STORES COMPANY AND SUBSIDIARIES,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This case presents the same question concerning the proper interpretation of Section 404(a)(6) of the Internal Revenue Code , 26 U.S.C. 404(a)(6), that was presented in *Lucky Stores, Inc.* v. *Commissioner*, 153 F.3d 964 (9th Cir. 1998), cert. denied, 119 S. Ct. 1755 (1999), and *Airborne Freight Corp.* v. *United States*, 153 F.3d 967 (9th Cir. 1998), cert. denied, 119 S. Ct. 1755 (1999). The facts and issues addressed in the present case are identical in all material respects to those presented in *Lucky Stores* and in *Airborne Freight.* The petition in this case was prepared and submitted by the same attorney who represented *Lucky Stores*, and it advances the same arguments made in that case.

For the reasons set forth in our brief in opposition in *Lucky Stores* and our brief in opposition in *Airborne Freight*, the decision of the court of appeals in the present case is correct and does not conflict with any decision of this Court or any other court of appeals.* Further review is therefore not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

SETH P. WAXMAN
Solicitor General

AUGUST 1999

---

* We are providing herewith to petitioner a copy of our briefs in opposition to the petition for a writ of certiorari in *Lucky Stores, Inc.* v. *Commissioner*, No. 98-1279, and in *Airborne Freight Corp.* v. *United States*, No. 98-1287.